



# Punishment and Deterrence: A Comparative Study of Tort Liability for Punitive Damages Under No-Fault Compensation Legislation

BY JEAN C. LOVE

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# Punishment and Deterrence: A Comparative Study of Tort Liability For Punitive Damages Under No-Fault Compensation Legislation

BY JEAN C. LOVE\*

## INTRODUCTION

Tort law has traditionally served several functions: compensation, deterrence, punishment and vindication.<sup>1</sup> Although compensation is generally regarded as the primary purpose of tort liability,<sup>2</sup> common law

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<sup>1</sup> J. FLEMING, *THE LAW OF TORTS* 1-3 (5th ed. 1977) [hereafter J. FLEMING]; 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 3.6-3.9, 4.7, 5.30, 9.6-9.7 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 1-14 (4th ed. 1971) [hereafter W. PROSSER].

<sup>2</sup> J. FLEMING, note 1 *supra*, at 2; 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 25.1 (1956).

tort actions have never provided reimbursement for every harm done by one person to another.<sup>3</sup> Instead, in recognition of tort law's multiple objectives, the common law has usually conditioned liability upon proof of fault.<sup>4</sup> Growing dissatisfaction with this system of compensation has resulted in the enactment of both "pure" and "modified" no-fault statutes.<sup>5</sup> In the United States, workers' compensation legislation has been adopted by every jurisdiction.<sup>6</sup> Additionally, several states have passed some type of "modified" no-fault plan governing automobile accidents.<sup>7</sup> In New Zealand, a comprehensive statute authorizes compensation whenever a person has sustained "personal injury by accident."<sup>8</sup>

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<sup>3</sup> J. FLEMING, note 1 *supra*, at 4.

<sup>4</sup> *Id.* at 4-5; W. PROSSER, note 1 *supra*, at 16-19. The requirement that liability be based on proof of fault was most vigorously enforced in the nineteenth century. Courts have been more willing to impose strict liability in the twentieth century. *Id.* at 17-19.

<sup>5</sup> J. FLEMING, note 1 *supra*, at 12-13. "Pure" no-fault statutes completely abrogate tort liability and create an alternative mechanism for compensating accident victims. "Modified" no-fault statutes retain tort liability in the more serious cases and create a substitute to tort liability only for relatively minor claims.

<sup>6</sup> 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 5.30 (1978); Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206 (1952) [hereafter Larson]. Workers' compensation is a "pure" no-fault plan because the benefits awarded are a complete substitute for the compensatory damages that would otherwise be recoverable in a negligence action against the employer. For a discussion of workers' compensation legislation in other countries, see Fleming, *Tort Liability for Work Injury*, in 15 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 9-1 to 9-46 (1975).

<sup>7</sup> 1 I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE* § 1.01 (2d ed. 1981) [hereafter I. SCHERMER]; Note, *No-Fault Automobile Insurance: An Evaluative Survey*, 30 RUTGERS L. REV. 909, 910-32 (1977). There are two types of no-fault plans for automobile accidents in the United States: "add-on" and "modified" plans. *Id.* at 923-31. "Add-on" plans supplement standard liability policies with first-party coverage for bodily injury and will not be considered in this article because they have no impact on tort liability. "Modified" plans provide compensation for economic loss and preclude tort actions for pain and suffering unless the plaintiff crosses a monetary or verbal "threshold" which is designed to ensure that the plaintiff has sustained substantial harm. "Modified no-fault" plans derive from the pioneering proposal advanced by Professors Keeton and O'Connell in 1965. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965).

<sup>8</sup> Accident Compensation Act of 1972, [1975] 2 N.Z. Stat. 1409. See generally M. BERKOWITZ, *ECONOMICS OF WORK ACCIDENTS IN NEW ZEALAND* (1979); A. BLAIR, *ACCIDENT COMPENSATION IN NEW ZEALAND* (1978) [hereafter A. BLAIR]; T. ISON, *ACCIDENT COMPENSATION: A COMMENTARY ON THE NEW ZEALAND SCHEME* (1980) [hereafter T. ISON]; G. PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* (1979) [hereafter G.

These types of no-fault plans have several common features. First, compensation may be obtained without proof of fault. Second, the amount of compensation available under no-fault statutes is less than that recoverable at common law. And finally, no-fault benefits are a complete or partial substitute for tort recovery.

When no-fault plans were enacted, the legislators focused on the inadequacy of tort law in performing its compensatory function.<sup>9</sup> The primary objective was to replace negligence liability with a swift, certain method of no-fault compensation.<sup>10</sup> However, the language used to create a substitute remedy was often so broad that it could be construed to abolish even intentional and recklessness tort actions.<sup>11</sup> This Article explores whether no-fault compensation legislation should be interpreted to abrogate all tort liability, or whether it should be construed more narrowly to preserve tort actions and remedies designed to promote punishment and deterrence. The Article first examines cases from both the United States and New Zealand, and then suggests various options for drafting no-fault compensation legislation which would preserve the punitive and deterrent functions of tort law.

### I. PURE NO-FAULT PLANS

Pure no-fault legislation typically provides benefits for personal injury and abrogates compensatory tort damages for such harm, at least in negligence actions.<sup>12</sup> This section considers whether pure no-fault legislation also bars the recovery of exemplary damages, which have traditionally served a punitive and deterrent function in actions for per-

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PALMER]; Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781 (1981).

<sup>9</sup> See generally R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 11-75 (1965); G. PALMER, note 8 *supra*, at 23-32; Larson, note 6 *supra*, at 209-11.

<sup>10</sup> R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 6-10 (1965); G. PALMER, note 8 *supra*, at 214-43; Larson, note 6 *supra*, at 206.

<sup>11</sup> For example, prior to 1983, the California workers' compensation statute provided that it was "the exclusive remedy for injury or death of an employee against the employer . . . ." CAL. LAB. CODE § 3601 (West Supp. 1982), amended by Act of Sept. 10, 1982, ch. 922, § 5, 1982 Cal. Legis. Serv. 4948, 4949 (West). Similarly, the New Zealand Accident Compensation Act states: "[W]here any person suffers personal injury by accident in New Zealand . . ., no proceedings for damages arising directly or indirectly out of the injury . . . shall be brought in any Court in New Zealand independently of this Act . . . ." Accident Compensation Act of 1972, § 5(1), [1975] 2 N.Z. Stat. 1409.

<sup>12</sup> See statutes quoted in note 11 *supra*.

sonal injury. The section reviews the cases construing the New Zealand Accident Compensation Act, and then examines the various types of workers' compensation statutes in the United States.

#### A. *New Zealand's Accident Compensation Act*

New Zealand's accident compensation plan is comprehensive. It covers not only work-related injuries, but extends to any "personal injury by accident."<sup>13</sup> Administered by the Accident Compensation Corporation,<sup>14</sup> the plan is funded by levies on employers and motor vehicles as well as by general tax revenues.<sup>15</sup> An injured client receives 1) compensation for medical expenses, rehabilitation treatment, and pecuniary losses not related to earnings; 2) earnings-related compensation (eighty percent of pre-accident earnings up to a maximum ceiling); 3) a lump sum benefit for permanent loss or impairment of bodily function (up to \$7000); and 4) a lump sum benefit for such nonphysical harm as pain and suffering and loss of amenities (up to \$10,000).<sup>16</sup> The stated purposes of this legislation are to provide compensation to all accident victims and to promote safety and rehabilitation.<sup>17</sup>

The Act clearly specifies that it is a substitute remedy for compensatory tort damages:

[W]here any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, . . . no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act . . . .<sup>18</sup>

<sup>13</sup> Accident Compensation Act of 1972, § 5(1), [1975] 2 N.Z. Stat. 1409.

<sup>14</sup> Accident Compensation Amendment Act of 1980, § 2, [1980] 2 N.Z. Stat. 726.

<sup>15</sup> T. ISON, note 8 *supra*, at 14.

<sup>16</sup> Accident Compensation Act of 1972, §§ 107-21, [1975] 2 N.Z. Stat. 1409; A. BLAIR, note 8 *supra*, at 2; T. ISON, note 8 *supra*, at 15. Compensation is also payable to dependents in the event of death. Accident Compensation Act of 1972, §§ 122-25, [1975] 2 N.Z. Stat. 1409.

<sup>17</sup> Accident Compensation Act of 1972, § 4, [1975] 2 N.Z. Stat. 1409. The Act evolved from a report by a Royal Commission headed by Mr. Justice Woodhouse. G. PALMER, note 8 *supra*, at 63-130. The Royal Commission stated five guidelines for implementing an accident compensation scheme:

- a) community responsibility in respect of all persons suffering injury by accident;
- b) comprehensive entitlement;
- c) rehabilitation with or in substitution for monetary compensation;
- d) realistic compensation for the whole period of incapacity and with recognition for loss resulting from permanent bodily impairment;
- e) administrative efficiency.

A. BLAIR, note 8 *supra*, at 4.

<sup>18</sup> Accident Compensation Act of 1972, § 5(1), [1975] 2 N.Z. Stat. 1409. The Acci-

It also may appear that the Act clearly prohibits the recovery of punitive damages as "damages" that arise "indirectly out of an injury or death." In fact, however, the New Zealand courts were sharply divided during the past five years on the question of whether the Act abolishes actions for punitive damages in cases of personal injury by accident.<sup>19</sup>

Most lower courts held that punitive damages are not recoverable.<sup>20</sup> In *Donselaar v. Donselaar*,<sup>21</sup> one brother hit another with a hammer. The plaintiff alleged assault and battery and prayed for an injunction and \$5000 in exemplary or punitive damages.<sup>22</sup> The trial court held that the plaintiff could proceed with the claim for injunctive relief, as the Act abolishes neither intentional tort *causes of action* nor the *remedy* of injunctive relief.<sup>23</sup> However, the trial judge dismissed the prayer for exemplary or punitive damages,<sup>24</sup> taking the position that the

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dent Compensation Corporation has exclusive jurisdiction to determine whether a person has coverage under the Act (*i.e.*, whether there has been a "personal injury by accident"). *Id.* § 5(5); *L v. M*, [1979] 2 N.Z.L.R. 519.

<sup>19</sup> See text accompanying notes 20-40 *infra*. See generally G. PALMER, note 8 *supra*, at 274-76; Bullock, *Exemplary Damages and the Accident Compensation Act*, [1982] N.Z.L.J. 26; Bullock, *Exemplary Damages and the Accident Compensation Act 1972*, [1980] N.Z.L.J. 215; Collins, *Proceedings for Punitive Damages in the Regime of Accident Compensation*, [1978] N.Z.L.J. 158; McInnes, *Punishing the Words of Section 5(1): The Other School of Thought Replies*, [1979] N.Z.L.J. 8; Vennell, *The Scope of National No-Fault Accident Compensation in Australia and New Zealand*, [1975] AUSTL. L.J. 22; Vennell, *Some Kiwi Kite-Flying*, [1975] N.Z.L.J. 254; Willy, *The Accident Compensation Act and Recovery for Losses Arising from Personal Injury and Death by Accident*, 6 N.Z.U.L. REV. 250 (1975).

<sup>20</sup> *E.g.*, *Stowers v. City of Auckland*, No. A. 1064/77 (N.Z.S.C. Auckland, May 2, 1979); *Betteridge v. McKenzie*, No. A. 103/77 (N.Z.S.C. Wellington, Dec. 7, 1978); *Koolman v. Attorney-General*, No. A. 519/76 (N.Z.S.C. Wellington, Oct. 3, 1977); *Donselaar v. Donselaar*, No. A. 454/76 (N.Z.S.C. Wellington, July 28, 1977), *aff'd on other grounds*, No. C.A. 145/77 (N.Z. Ct. App. Mar. 19, 1982) (copies of all slip opinions on file at U.C. Davis Law Review office).

<sup>21</sup> No. A. 454/76 (N.Z.S.C. Wellington, July 28, 1977), *aff'd on other grounds*, No. C.A. 145/77 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>22</sup> *Id.*, slip op. at 1.

<sup>23</sup> *Id.* at 3. The Act explicitly abolishes only two causes of action: the action for loss of services and the action for loss of consortium. Accident Compensation Act of 1972, § 5(2), [1975] 2 N.Z. Stat. 1409. All other tort actions remain in existence, and the Act bars merely the remedy of "damages arising directly or indirectly out of the injury or death" caused by accident. *Id.* § 5(1). Therefore, court proceedings to enjoin an intentional tort may still be brought even though the plaintiff has sustained personal injury by accident.

<sup>24</sup> *Donselaar v. Donselaar*, No. A. 454/76, slip op. at 3 (N.Z.S.C. Wellington, July 28, 1977), *aff'd on other grounds*, No. C.A. 145/77 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

phrase "damages arising directly or indirectly out of the injury" relates to "both branches of damages, that is, compensatory and exemplary."<sup>25</sup>

In three other cases denying exemplary or punitive damages, private citizens brought assault and battery actions against police officers.<sup>26</sup> The most carefully reasoned of these three cases is *Stowers v. City of Auckland*.<sup>27</sup> In *Stowers*, the plaintiff claimed that while he was waiting to be tested for intoxication, a police officer struck him. The plaintiff sought \$15,000 in punitive damages for the "oppressive, capricious, high-handed, arbitrary and improper use of the defendant's authority and also as a deterrent against similar conduct by the employees of the defendant."<sup>28</sup> The court acknowledged the value of punitive damages "in times of increasing bureaucratic intervention," recognizing that such damages "may well be the most effective avenue of redress available to a citizen for whose rights some branch of government, central or local, has shown contumacious disregard."<sup>29</sup>

Nevertheless, the court believed that the legislature clearly intended to abolish punitive damages in cases of personal injury by accident. The court observed that the Act originally had provided: "No action shall lie for damages in respect of injury or death" caused by accident.<sup>30</sup> The court suggested that, under this language, punitive damages might have been recoverable, as the statute barred only "damages referable to the injury, which must accordingly be compensatory in nature."<sup>31</sup> Since punitive damages are not awarded to compensate the victim's injuries, but rather to punish the wrongdoer, they might not have been affected by the original Act.<sup>32</sup> But because the legislature amended the Act in 1974

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<sup>25</sup> *Id.*, slip op. at 2.

<sup>26</sup> *Stowers v. City of Auckland*, No. A. 1064/77 (N.Z.S.C. Auckland, May 2, 1979); *Betteridge v. McKenzie*, No. A. 103/77 (N.Z.S.C. Wellington, Dec. 7, 1978); *Koolman v. Attorney-General*, No. A. 519/76 (N.Z.S.C. Wellington, Oct. 3, 1977) (copies on file at U.C. Davis Law Review office).

<sup>27</sup> No. A. 1064/77 (N.Z.S.C. Auckland, May 2, 1979) (copy on file at U.C. Davis Law Review office).

<sup>28</sup> *Id.*, slip op. at 2.

<sup>29</sup> *Id.* at 13. Judge McMullin recognized criminal prosecution as an alternative remedy, but said that it would often be difficult "to identify with sufficient particularity, for the purpose of a criminal prosecution, the individual persons responsible." *Id.* at 14.

<sup>30</sup> *Id.* at 16-17. For a comparison of the language of the Act as originally passed and as amended in 1974, see Collins, *Proceedings for Punitive Damages in the Regime of Accident Compensation*, [1978] N.Z.L.J. 158, 163.

<sup>31</sup> *Stowers v. City of Auckland*, No. A. 1064/77, slip op. at 17 (N.Z.S.C. Auckland, May 2, 1979) (copy on file at U.C. Davis Law Review office).

<sup>32</sup> See generally Collins, *Proceedings for Punitive Damages in the Regime of Accident Compensation*, [1978] N.Z.L.J. 158, 164-66.

to prohibit "proceedings for damages arising directly or indirectly out of the injury or death," the court believed that the legislature had unequivocally expressed an intent to abolish all damages flowing from personal injury by accident.<sup>33</sup> Unlike the language of the original Act, which had characterized the *nature* of the prohibited damages, the amended language seemed to focus on their *cause*.<sup>34</sup> The court observed that punitive damages cannot be awarded without proof of causation by tortious conduct.<sup>35</sup> Since the tortious conduct in *Stowers* was the intentional infliction of physical injury,<sup>36</sup> the court concluded that the plaintiff's claim for punitive damages "arose directly or indirectly out of the injury," and dismissed the complaint.<sup>37</sup>

Although the majority of trial court judges were convinced that the amended Act prohibited claims for punitive damages, one lower court judge advanced a contrary interpretation. In *Howse v. Attorney General*,<sup>38</sup> the court held that a plaintiff who alleged an assault and battery by a police officer could claim punitive damages despite the 1974 amendment because punitive damages "arise . . . from the acts done contrary to law and not from the *harm* to the plaintiff caused by such acts."<sup>39</sup>

In 1982, the Court of Appeal of New Zealand resolved the split of trial court authority by adopting the *Howse* court's interpretation of the Accident Compensation Act.<sup>40</sup> The vehicle for the Court of Appeal's pronouncement was an appeal from the trial court's judgment in *Donselaar*.<sup>41</sup> The appellate opinion contains a complete statement of the

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<sup>33</sup> *Stowers v. City of Auckland*, No. A. 1064/77, slip op. at 17-18 (N.Z.S.C. Auckland, May 2, 1979) (copy on file at U.C. Davis Law Review office).

<sup>34</sup> *Id.* at 17.

<sup>35</sup> *Id.* at 18.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 20.

In *Betteridge v. McKenzie*, No. A. 103/77 (N.Z.S.C. Wellington, Dec. 7, 1978) (copy on file at U.C. Davis Law Review office), an action by two racetrack patrons against a racecourse inspector and several police officers for assault and battery, the court advanced an alternative rationale for dismissing an exemplary damages complaint. It refused to believe that the legislature could have intended to preserve the highly controversial punitive damages remedy as the "only form of damages available in personal injury claims." *Id.* at 6.

<sup>38</sup> No. A. 132/75 (N.Z.S.C. Palmerston North, Oct. 19, 1977) (copy on file at U.C. Davis Law Review office).

<sup>39</sup> *Id.*, slip op. at 13 (emphasis added).

<sup>40</sup> *Donselaar v. Donselaar*, No. C.A. 145/77 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>41</sup> See text accompanying notes 21-25 *supra*.



facts. The evidence showed a long feud between the plaintiff (John) and the defendant (Andries), who were brothers.<sup>42</sup> They had entered into a consent judgment, stipulating that John's lease to a particular piece of property had expired and that Andries was in lawful possession of the premises.<sup>43</sup> Despite this consent decree, John trespassed upon Andries' property.<sup>44</sup> In response, Andries attacked John with a hammer.<sup>45</sup> John then sued Andries for assault and battery.<sup>46</sup>

The first issue facing the Court of Appeal was whether the Act applied; that is, whether the plaintiff had suffered "personal injury by accident."<sup>47</sup> Since the plaintiff alleged an intentional tort, the Court considered the argument that the injury did not occur "by accident."<sup>48</sup> The Court rejected this argument, however, and followed the well-established precedents construing workers' compensation legislation in Great Britain and New Zealand.<sup>49</sup> Workers' compensation legislation typically provides the exclusive remedy for "injury by accident" arising out of and in the course of employment.<sup>50</sup> In *Trim Joint District School Board of Management v. Kelly*,<sup>51</sup> workers' compensation death benefits were awarded for the premeditated killing of a teacher by his students on the theory that the word "accident" is to be interpreted from the worker's point of view.<sup>52</sup> The *Kelly* court observed that "what occurs to the workman may from his point of view be plainly an accident although some mischievous person may have designedly caused the occur-

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<sup>42</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Cooke, J. at 26 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 3, 26.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> Accident Compensation Act of 1972, § 5(1), [1975] 2 N.Z. Stat. 1409.

The Act gives the Accident Compensation Corporation exclusive jurisdiction to determine, as an issue of fact, whether the plaintiff has suffered personal injury by accident. *Id.* § 5(5); *L v. M*, [1979] 2 N.Z.L.R. 519. In *Donselaar*, the Court was determining, as a matter of law, whether intentional tort actions causing personal injury are covered by the Act.

<sup>48</sup> The plaintiff in *G v. Auckland Hosp. Bd.*, [1976] 1 N.Z.L.R. 638, had advanced this argument to the supreme court in Auckland, which rejected it. The Court of Appeal in *Donselaar* approved the Auckland court's decision for the reasons discussed in the text accompanying notes 49-56 *infra*.

<sup>49</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Cooke, J. at 17-18 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>50</sup> J. FLEMING, note 1 *supra*, at 494.

<sup>51</sup> 1914 A.C. 667.

<sup>52</sup> *Id.* at 679-82, 708-09.

rence.”<sup>53</sup> Similarly, the *Donselaar* court held that the existence of an accident should be examined from the victim’s point of view.<sup>54</sup> The Court refused to consider whether the defendant was an intentional, reckless, or negligent wrongdoer, for that is “the description of the actor, and not a description of what the victim suffered.”<sup>55</sup> Thus, even though Andries might have deliberately attacked John, the Court found that John suffered “personal injury by accident” because the hammer blow was quite unexpected from John’s point of view.<sup>56</sup>

The second issue before the Court was whether the Accident Compensation Act barred the plaintiff’s claim as one for “damages arising directly or indirectly out of the injury.”<sup>57</sup> The Court examined the British distinction between “exemplary” and “aggravated” damages,<sup>58</sup> which the Court had recognized as part of the law of New Zealand in *Taylor v. Beere*,<sup>59</sup> a defamation case decided the same day as *Donselaar*. Aggravated damages are awarded when the plaintiff’s injury is aggravated by the manner in which the defendant acted,<sup>60</sup> and may include sums for loss of reputation, injured feelings, outraged morality, and indignation.<sup>61</sup> Punitive damages, in contrast, are awarded “as a punishment and a deterrent, to show that tortious conduct does not pay.”<sup>62</sup> The *Donselaar* court concluded that the Act barred aggravated damages because they are compensatory in nature.<sup>63</sup> The Court then held that the plaintiff was precluded from recovering damages because, although he had prayed for exemplary damages,<sup>64</sup> he had submitted proof of nothing more than aggravated damages for physical injury and

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<sup>53</sup> *Id.* at 708.

<sup>54</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Cooke, J. at 18 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>55</sup> *G v. Auckland Hosp. Bd.*, [1976] 1 N.Z.L.R. 638, 641.

<sup>56</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Cooke, J. at 18 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>57</sup> Accident Compensation Act of 1972, § 5(1), [1975] 2 N.Z. Stat. 1409.

<sup>58</sup> See *Rookes v. Barnard*, 1964 A.C. 1129, 1221.

<sup>59</sup> No. C.A. 38/80, slip op. by Somers, J. at 8 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Cooke, J. at 24-25 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>64</sup> The complaint alleged that, as a result of the hammer blow, the plaintiff had suffered “substantial indignity, mental suffering, disgrace and humiliation,” and prayed for “exemplary or punitive” damages in the amount of \$5000. *Id.* at 3.

hurt feelings.<sup>65</sup> The Court of Appeal thus affirmed the lower court's decision on different grounds. The lower court had treated the plaintiff's claims as one for exemplary or punitive damages, and took the position that the Act barred such damages.<sup>66</sup> The Court of Appeal, however, reclassified the damages as "aggravated damages," and held that they were a form of compensatory damages precluded by the Act.<sup>67</sup> As an alternative holding, two judges indicated that even proven exemplary damages would not have been recoverable, because there was evidence of "provocation" and "fraternal wrangling."<sup>68</sup>

The *ratio decidendi* in *Donselaar* made it unnecessary to determine whether the Act barred the alleged punitive damages. The Court recognized, however, that the parties had briefed and argued this point, that the issue presented a pure question of law, and that the lower courts had expressed divergent points of view upon the matter.<sup>69</sup> Therefore, in dictum, the Court considered whether punitive damages arise directly or indirectly from personal injury by accident. The Court began by candidly acknowledging that the statute could be construed to bar punitive damages. Although punitive damages are not "given for the injury," they are awarded "because the plaintiff has been the victim of the conduct regarded by the Court as reprehensible . . . ."<sup>70</sup> Nevertheless, the Court believed that the legislature did not intend to bar punitive damages when it passed the Act:

The "mischief" which the Accident Compensation Act set out to remedy must have been primarily the uneven and inadequate scope of common law negligence actions as a means of securing compensation for personal injury in modern society. There is no reason to suppose that any suggested deficiency in the common law remedies for intentional wrongs was a real source of concern.<sup>71</sup>

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<sup>65</sup> *Id.* at 26. Judge Somers acknowledged the difficulty of proving punitive or exemplary damages in cases of physical injury by accident: "Indeed without some additional feature as for example an abuse of power or the invasion of other rights of the plaintiff, it is not easy to envisage a case of personal injury which would not have been met by compensatory or aggravated compensatory damages . . . ." *Id.*, slip op. by Somers, J. at 14 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>66</sup> See text accompanying notes 21-25 *supra*.

<sup>67</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Cooke, J. at 24-27; slip op. by Richardson, J. at 12; slip op. by Somers, J. at 14 (N.Z. Ct. App. Mar. 19, 1982) (copies of all slip opinions on file at U.C. Davis Law Review office).

<sup>68</sup> *Id.*, slip op. by Cooke, J. at 26-27; slip op. by Richardson, J. at 12.

<sup>69</sup> *Id.*, slip op. by Somers, J. at 3.

<sup>70</sup> *Id.*, slip op. by Cooke, J. at 21.

<sup>71</sup> *Id.* at 18. See generally G. PALMER, note 8 *supra*, at 271-78.

The Court also observed that the long title of the Accident Compensation Act suggested that its sole purpose was to provide compensation, not to replace punitive dam-

Furthermore, the Court believed that recognizing punitive damages as an independent remedy would serve the public interest.<sup>72</sup> The Court observed that New Zealand's society "has become more vocal, factional and discordant," with a "scepticism about established institutions."<sup>73</sup> Allegations of misuse of power by the police and other authorities have been increasingly common.<sup>74</sup> For these reasons, the Court felt a need for effective sanctions against the "irresponsible, malicious or oppressive use of power"<sup>75</sup> as well as a punitive remedy for the "commonplace types of trespass or assault . . . which touch the life of ordinary men and women."<sup>76</sup> Having examined both the legislature's intent and the policy considerations, the Court returned to the language of the Act, concluding that punitive damages do not "arise directly or indirectly out of injury or death" because they do not arise out of the harm to the plaintiff,<sup>77</sup> but out of the outrageous nature of the defendant's conduct.<sup>78</sup>

The Court then discussed the practical problems raised by its decision to recognize punitive damages as an independent remedy outside the Act. First, it had to determine the scope of punitive damages.<sup>79</sup> The

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ages. *Donselaar v. Donselaar*, No. C.A. 145/177, slip op. by Cooke, J. at 6, 18 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>72</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Cooke, J. at 18 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>73</sup> *Id.* at 23.

<sup>74</sup> *Id.* at 24.

<sup>75</sup> *Id.* at 23.

<sup>76</sup> *Id.*

In *Taylor v. Beere*, No. C.A. 38/80, slip op. by Richardson, J. at 7-9 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office), Justice Richardson recognized that criminal law penalties provide an alternative sanction, yet concluded that punitive damages should be recognized because criminal sanctions are not always available (e.g., in defamation actions) and, when they are, it is dangerous to rely upon them as the exclusive vehicle of social control. He also noted that the legislature had explicitly sanctioned the coexistence of penal and compensatory remedies by enacting statutes that permit judges to allocate a portion of a monetary fine to the victim of the crime. *Id.* at 8.

<sup>77</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Richardson, J. at 5 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>78</sup> *Id.* The Court pointed out that if the legislature were dissatisfied with the Court's decision, it could amend the Act to restrict or preclude the recovery of punitive damages. *Id.*, slip op. by Cooke, J. at 25.

<sup>79</sup> The scope of punitive damages had been identified as an issue, but left unresolved, in several prior Court of Appeal cases. *Huljich v. Hall*, [1973] 2 N.Z.L.R. 279; *News Media Ownership v. Finlay*, [1970] N.Z.L.R. 1089; *Truth (N.Z.) Ltd. v. Bowles*, [1966] N.Z.L.R. 303. The lower courts had also discussed the question. *A. v. B.*, [1974] 1 N.Z.L.R. 673 (S.C.); *Carrington v. Attorney-General and Murray*, [1972] N.Z.L.R. 1106 (S.C.); *Fogg v. McKnight*, [1968] N.Z.L.R. 330 (S.C.).

Court discussed this issue in the defamation case, *Taylor v. Beere*.<sup>80</sup> In *Taylor*, the Court acknowledged that the House of Lords had severely limited the scope of the punitive remedy in Great Britain.<sup>81</sup> Specifically, the right to recover punitive damages in England is now restricted to 1) cases of oppressive, arbitrary or unconstitutional action by servants or agents of the government; 2) cases in which the defendant's conduct is in contumelious disregard of another's rights in order to obtain some advantage which would outweigh any compensatory damages likely to be obtained by the victim; and 3) cases in which exemplary damages are permitted by statute.<sup>82</sup> But the *Taylor* court also recognized that in *Australian Consolidated Press Ltd. v. Uren*,<sup>83</sup> the Privy Council had permitted Australia to ignore the House of Lords' restrictions and to continue developing its own, broader rules governing the scope of the punitive damages remedy. Following the Australian lead, the *Taylor* court rejected the British restrictions<sup>84</sup> and held that punitive damages are recoverable in New Zealand whenever the conduct of the defendant "merits punishment" because it is "wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like"; that is, when the defendant "acts in contumelious disregard of the plaintiff's rights."<sup>85</sup>

Another practical problem facing the *Donselaar* Court was whether punitive damages could be awarded in the absence of compensatory damages. It reviewed English and American cases<sup>86</sup> and concluded there was precedent for awarding punitive damages solely on the basis of nominal damages.<sup>87</sup> Alternatively, the Court held that if proof of actual harm were necessary, the plaintiff could submit evidence of the loss covered by the Accident Compensation Act.<sup>88</sup> As for the difficulty in assessing the amount of punitive damages in the absence of proof of

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<sup>80</sup> No. C.A. 38/80 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>81</sup> *Id.*, slip op. by Richardson, J. at 1, citing *Cassell & Co. v. Broome*, 1972 A.C. 1027; *Rookes v. Barnard*, 1964 A.C. 1129.

<sup>82</sup> *Taylor v. Beere*, No. C.A. 38/80, slip op. by Somers, J. at 2-3 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office), citing *Cassell & Co. v. Broome*, 1972 A.C. 1027; *Rookes v. Barnard*, 1964 A.C. 1129.

<sup>83</sup> [1969] 1 A.C. 590. For a discussion of this case, see H. LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH §§ 1.216, 1.803-1.805 (1974).

<sup>84</sup> *Taylor v. Beere*, No. C.A. 38/80, slip op. by Cooke, J. at 10-15 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>85</sup> *Id.*, slip op. by Somers, J. at 2.

<sup>86</sup> *Donselaar v. Donselaar*, No. C.A. 145/77, slip op. by Richardson, J. at 7-11 (N.Z. Ct. App. Mar. 19, 1982) (copy on file at U.C. Davis Law Review office).

<sup>87</sup> *Id.* at 11.

<sup>88</sup> *Id.*

compensatory damages,<sup>89</sup> one judge suggested that trial judges determine whether the circumstances as a whole merit punishment and, if so, what sum should be awarded to achieve that end, taking into account the means of the parties.<sup>90</sup>

In summary, the drafters of the New Zealand Accident Compensation Act probably never considered whether the Act bars punitive damages. They could have addressed the question by indicating whether the phrase "damages arising directly or indirectly out of the injury or death" was explicitly intended to encompass punitive damages.<sup>91</sup> Faced with an ambiguous statute, the Court of Appeal in *Donselaar* decided to recognize punitive damages as an independent remedy outside the Act. Although the Court was especially concerned about preserving an effective remedy that would enable private citizens to punish and deter oppressive, arbitrary or irresponsible conduct by public officials, it did not restrict the availability of punitive damages to such circumstances. Instead, it authorized the remedy against any defendant who acts in contumelious disregard of the plaintiff's rights.

### B. United States: Workers' Compensation Legislation

This article has examined the availability of punitive damages as an independent remedy outside the New Zealand Accident Compensation Act, and will now compare the availability of punitive damages under workers' compensation legislation in the United States. Workers' compensation legislation is a form of social insurance that shifts the cost of industrial injuries from the worker to the industry and ultimately to the consuming public.<sup>92</sup> Benefits are typically awarded for an "accidental injury or death arising out of and in the course of employment."<sup>93</sup> The worker receives compensation for medical expenses and rehabilitation costs and a subsistence allowance that partially covers wage losses.<sup>94</sup>

Workers' compensation is often described as the legislative embodiment of a compromise between employers and employees.<sup>95</sup> Workers

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<sup>89</sup> *Id.*, slip op. by Cooke, J. at 21-23.

<sup>90</sup> *Id.*, slip op. by Somers, J. at 13.

<sup>91</sup> When a comprehensive accident compensation bill was drafted in Australia, the term "damages" was explicitly defined to exclude "punitive or exemplary damages," thereby making it possible to bring tort actions for punitive damages outside the scope of the proposed legislation. G. PALMER, note 8 *supra*, at 286.

<sup>92</sup> J. FLEMING, note 1 *supra*, at 495-96; 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.10 (1978).

<sup>93</sup> 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.10 (1978).

<sup>94</sup> J. FLEMING, note 1 *supra*, at 494-95.

<sup>95</sup> *Mauch v. Stanley Structures, Inc.*, 641 P.2d 1247, 1249 (Wyo. 1982).

have relinquished their common law tort remedies, at least for negligence, in exchange for more limited benefits that are paid swiftly, efficiently, and without proof of fault.<sup>96</sup> Employers have given up their common law defenses in exchange for protection from unlimited liability.<sup>97</sup> Most legislatures have memorialized this compromise in "exclusive remedy" provisions,<sup>98</sup> which typically provide that the availability of workers' compensation "excludes all other rights and remedies of the employee against the employer in an action at common law."<sup>99</sup>

The United States' exclusive remedy statutes are very broad. The above provision bars all rights, including entire causes of action, and all remedies. The provisions are uniformly construed to bar the recovery of compensatory damages in negligence actions against employers.<sup>100</sup> The question is whether they also preclude punitive awards in intentional tort and recklessness actions. Several jurisdictions hold that their exclusive remedy statutes give blanket immunity to the employer against all

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<sup>96</sup> *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, 577 (1982).

<sup>97</sup> *Id.*

<sup>98</sup> ALA. CODE § 25-5-53 (1975); ALASKA STAT. § 23.30.055 (1972); ARK. STAT. ANN. § 81-1304 (Supp. 1981); CAL. LAB. CODE § 3602 (West Supp. 1983); COLO. REV. STAT. § 8-42-102 (Supp. 1981); CONN. GEN. STAT. ANN. § 31-284(a) (West 1972); DEL. CODE ANN. tit. 19, § 2304 (1979); FLA. STAT. ANN. § 440.11 (West 1981); GA. CODE ANN. § 114-103 (Supp. 1982); HAWAII REV. STAT. § 386-5 (1976); ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 22-3-2-6 (Burns 1974); IOWA CODE ANN. § 85.20 (West Supp. 1982); KAN. STAT. ANN. § 44-501 (1981); ME. REV. STAT. ANN. tit. 39, § 28 (1978); MICH. STAT. ANN. § 17.237 (131) (Callaghan 1982); MINN. STAT. ANN. § 176.031 (West 1966); MISS. CODE ANN. § 71-3-9 (1972); MO. ANN. STAT. § 287.120 (Vernon Supp. 1982); MONT. CODE ANN. § 39-71-411 (Supp. 1979); NEV. REV. STAT. § 616.370 (1973); N.H. REV. STAT. ANN. § 281.12 (Supp. 1981); N.M. STAT. ANN. § 52-1-9 (1978); N.Y. WORK. COMP. LAW § 10 (McKinney 1965); N.C. GEN. STAT. § 97-10.1 (1979); N.D. CENT. CODE § 65-01-08 (1960); OHIO REV. CODE ANN. § 4123.74 (Page 1980); OKLA. STAT. ANN. tit. 85, § 11 (West Supp. 1981); PA. STAT. ANN. tit. 77, § 481(a) (Purdon Supp. 1982); R.I. GEN. LAWS § 28-29-20 (1979); S.C. CODE ANN. § 42-1-540 (Law. Co-op. 1976); TENN. CODE ANN. § 50-908 (1977); TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967); UTAH CODE ANN. § 35-1-60 (1953); VT. STAT. ANN. tit. 21, § 622 (1978); VA. CODE § 65.1.40 (1980); WIS. STAT. ANN. § 102.03(2) (West Supp. 1982); WYO. STAT. § 27-12-103 (1977).

For a general discussion of exclusive remedy provisions, see 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 65.10 (1982).

<sup>99</sup> *E.g.*, GA. CODE ANN. § 114-103 (Supp. 1982).

<sup>100</sup> *E.g.*, *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, 577 (1982); *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 913 (W. Va. 1978).

types of tort actions.<sup>101</sup> Other jurisdictions have carved out legislative or judicial exceptions to the exclusive remedy clause, reasoning that the workers' compensation compromise never included intentional tort and recklessness actions.<sup>102</sup> This section examines the statutes and cases that continue to permit plaintiffs to bring selected tort actions to punish and deter egregious misconduct by employers.

### 1. Punitive Damages in Addition to Workers' Compensation

If the United States were to follow New Zealand's example, it would regard workers' compensation benefits as a complete substitute for compensatory damages and would permit the recovery of punitive damages only as an independent cumulative remedy. However, the courts in the United States have uniformly dismissed plaintiffs' independent punitive damages actions on the basis of the exclusive remedy provisions.<sup>103</sup> In evaluating these decisions, it must be remembered that the United States' workers' compensation statutes abrogate "all other rights and

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<sup>101</sup> *Eason v. Frontier Air Lines, Inc.*, 636 F.2d 293 (10th Cir. 1981) (applying Colorado law to intentional violation of collective bargaining agreement); *Sands v. Union Camp Corp.*, 559 F.2d 1345 (5th Cir. 1977) (applying Georgia law to assault and battery); *Wilkins v. West Point-Pepperell, Inc.*, 397 So. 2d 115 (Ala. 1981) (fraud prior to and after injury); *Ellis v. Rocky Mountain Empire Sports, Inc.*, 43 Colo. App. 166, 602 P.2d 895 (1979) (intentional infliction of emotional distress causing physical injury); *Kofron v. Amoco Chem. Corp.*, 441 A.2d 226 (Del. 1982) (fraud prior to and after injury); *Southern Wire & Iron, Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962) (battery); *Burkhart v. Wells Elecs. Corp.*, 139 Ind. App. 658, 215 N.E.2d 879 (1966) (battery); *Sewell v. Bathey Mfg. Co.*, 103 Mich. App. 732, 303 N.W.2d 876 (1981) (intentional violation of safety statute); *Rico v. Precision Eng'g & Mfg. Co.*, 381 So. 2d 170 (Miss. 1980) (trespass to chattels). For a critical commentary on the Indiana courts' construction of that state's exclusive remedy statute, see Note, *Judicial Misapplication of the Indiana Workmen's Compensation Act to Injuries Resulting from an Employer's Wilful Conduct*, 13 VAL. U.L. REV. 561 (1979).

<sup>102</sup> See text accompanying notes 103-267 *infra*.

<sup>103</sup> *Houston v. Bechtel Assocs. Prof. Corp.*, 522 F. Supp. 1094 (D.D.C. 1981) (applying Longshoremens' and Workers' Compensation Act to recklessness); *Roof v. Veliscol Chem. Corp.*, 380 F. Supp. 1373 (N.D. Ohio 1974) (applying Ohio law to fraud); *Woodell v. Washington Steel Corp.*, 269 F. Supp. 958 (W.D. Pa. 1967) (applying Pennsylvania law to gross negligence); *Evans v. Newport News Shipbuilding & Dry Dock Co.*, 243 F. Supp. 1017 (E.D. Va. 1965) (applying Virginia law to willful failure to maintain safe workplace); *Coney v. International Minerals & Chem. Corp.*, 425 So. 2d 171 (Fla. Dist. Ct. App. 1983) ("culpable negligence"); *Cunningham v. Aluminum Co. of America*, 417 N.E.2d 1186 (Ind. Ct. App. 1981) (intentional statutory violation); *Lawrence v. Phillips Petroleum Co.*, 6 Kan. App. 2d 272, 627 P.2d 1168 (1981) ("wanton disregard" of safety in the workplace); *Gambrell v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163 (Mo. App. 1978) (fraud); *Beck v. Hamann*, 263 Wis. 131, 56 N.W.2d 837 (1953) (deliberate intent).



remedies,"<sup>104</sup> whereas the New Zealand Accident Compensation Act bars only actions for "damages arising directly or indirectly out of the injury or death" caused by accident.<sup>105</sup> The broad language of the exclusive remedy provisions makes it difficult for American courts to follow the New Zealand precedent set in *Donselaar*.<sup>106</sup> Furthermore, the courts have held that eliminating punitive damages in workers' compensation cases was part of the "trade-off" leading to the passage of workers' compensation acts,<sup>107</sup> and they have been reluctant to upset the

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<sup>104</sup> See text accompanying note 99 *supra*.

<sup>105</sup> See text accompanying note 18 *supra*.

<sup>106</sup> See text accompanying notes 40-90 *supra*.

Even under more narrowly worded exclusive remedy provisions, courts in the United States have refused to permit the recovery of punitive damages. In *North v. United States Steel Corp.*, 495 F.2d 810 (7th Cir. 1974), the plaintiff sought to rely on the following qualification to Indiana's exclusive remedy statute: "Nothing in this act . . . shall be construed to relieve any employer . . . from penalty for failure . . . to perform any statutory duty." IND. CODE ANN. § 22-3-2-7 (Burns 1974). The plaintiff claimed that punitive damages were a "penalty" which he should be permitted to recover upon proof that his employer had recklessly violated Indiana's safe place statute. *North v. United States Steel Corp.*, 495 F.2d at 813. The court rejected the plaintiff's contention, holding that the qualification applies only to "a pecuniary charge imposed and enforced by the state for the violation of the safe place statute." *Id.* at 814.

In a second case, the plaintiff urged a restrictive interpretation of Iowa's original exclusive remedy statute, which exempted the employer from liability "for the recovery of damages or other compensation . . ." *Stricklen v. Pearson Constr. Co.*, 185 Iowa 95, 98, 169 N.W. 628, 629 (1918) (emphasis added). The plaintiff contended that the exclusive remedy provision applied only to compensatory damages. *Id.* at 97, 169 N.W. at 628. The court dismissed the claim for punitive damages on two grounds: 1) the exclusive remedy statute bars any common law tort action; and 2) punitive damages are recoverable only upon proof of actual or compensatory damages, which this plaintiff could not establish because he had already received workers' compensation benefits. *Id.* at 97-98, 169 N.W. at 628-29. See also *Evans v. Newport News Shipbuilding & Dry Dock Co.*, 243 F. Supp. 1017, 1019 (E.D. Va. 1965). Although the first ground of the opinion is unobjectionable, the second is highly questionable. The purpose of requiring proof of compensatory damages as a condition for recovering punitive damages in a recklessness action is to ensure that the plaintiff has established a prima facie case of liability. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 208-10 (1973) [hereafter D. DOBBS]. If a plaintiff establishes the fact of actual harm, punitive damages should be available regardless of the receipt of workers' compensation benefits. *Id.* at 210. See generally *Singer v. Shop-Rite, Inc.*, 174 N.J. Super. 442, 416 A.2d 965 (1980) (punitive damages recoverable in battery action against employer when jury specifically found that a battery had occurred, but awarded no compensatory damages). For further discussion of this issue, see text accompanying notes 122-25 *infra*.

<sup>107</sup> *E.g.*, *Lawrence v. Phillips Petroleum Co.*, 6 Kan. App. 2d 272, 275, 627 P.2d 1168, 1170 (1981).

delicate balance struck between the competing considerations.<sup>108</sup> Moreover, courts have expressed concern that permitting punitive damages would frustrate the legislature's policy of partial reimbursement.<sup>109</sup>

Given the comprehensive scope of the standard exclusive remedy clause, punitive damages are currently available as an independent remedy in addition to workers' compensation only with explicit legislative authorization. Texas is the one state that has passed such a statute: "Nothing in this Act shall be taken . . . to prohibit the recovery of exemplary damages by the surviving husband, wife, [or] heirs . . . of any deceased employee whose death is occasioned by homicide from the willful act or omission or gross negligence [of the employer]."<sup>110</sup>

Until recently, the Texas Supreme Court strictly construed the statute.<sup>111</sup> As a result, very few plaintiffs' judgments were sustained on appeal.<sup>112</sup> But in *Burk Royalty Co. v. Walls*,<sup>113</sup> the court articulated a more lenient test for gross negligence, permitting the plaintiff to establish that the defendant acted with conscious indifference to the plaintiff's rights by proving either passive or active misconduct.<sup>114</sup> The court

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<sup>108</sup> *E.g.*, *Houston v. Bechtel Assocs. Prof. Corp.*, 522 F. Supp. 1094, 1097 (D.D.C. 1981).

<sup>109</sup> *E.g.*, *Roof v. Velsicol Chem. Corp.*, 380 F. Supp. 1373, 1374 (N.D. Ohio 1974).

<sup>110</sup> TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967).

The Texas Legislature distinguished between fatal and nonfatal accidents because it was acting under the following state constitutional mandate:

Every person, corporation or company that may commit a homicide, through willful act or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, [or] heirs . . . .

*Castleberry v. Frost-Johnson Lumber Co.*, 283 S.W. 141, 145 (Tex. Civ. App. 1926). The constitutionality of the distinction between fatally and nonfatally injured employees has been challenged on equal protection grounds without success. *McDonald v. Sabayrac Battery Assocs.*, 620 S.W.2d 850 (Tex. Civ. App. 1981).

Corporate as well as individual employers may be held liable under the Act because Texas holds corporations liable for the gross negligence or subsequently ratified gross negligence of an employee. Nations & Bennett, *Recovery of Exemplary Damages under the Texas Workers' Compensation Act*, 19 S. TEX. L.J. 431, 436-38 (1978) [hereafter Nations & Bennett].

<sup>111</sup> Nations & Bennett, note 110 *supra*, at 438-42. A comprehensive review of the Texas cases defining the term "gross negligence" prior to 1981 appears in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981).

<sup>112</sup> *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 917-19 (Tex. 1981).

<sup>113</sup> 616 S.W.2d 911 (Tex. 1981).

<sup>114</sup> *Id.* at 922. Elsewhere in the opinion, the court said that "gross negligence" is "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons affected by it." *Id.* at 920.

also modified the standard of appellate review,<sup>115</sup> rejecting its prior practice of overturning punitive damages verdicts whenever the defendant could point to evidence in the record that "some care" had been exercised.<sup>116</sup> The *Burk Royalty* court announced that it would reverse punitive awards for plaintiffs only when there is "no evidence" to support the finding of gross negligence.<sup>117</sup>

Applying this modified standard of review, the court affirmed a \$100,000 punitive damages award to the widow of an oil rig worker fatally burned in an oil and gas explosion.<sup>118</sup> The evidence showed that the defendant had not supplied proper safety equipment, had not prohibited smoking near the oil rig, and had not instructed the crew on the proper use of fire extinguishers.<sup>119</sup> There was no indication that the defendant had acted for the purpose of causing harm to the plaintiff nor with knowledge that harm was substantially certain to result. Thus, *Burk Royalty* permits a plaintiff to recover punitive damages against an employer upon a showing of recklessness. The court's holding is consistent with the language of the statute,<sup>120</sup> but represents a significant departure from earlier cases construing it.<sup>121</sup>

Texas courts have traditionally adhered to the rule that punitive damages can be recovered only upon proof of compensatory, and not merely nominal, damages.<sup>122</sup> Therefore, in the first suits under the statute, defendants contended that plaintiffs who had received workers' compensation benefits could not maintain a separate action for punitive damages because the exclusive remedy clause barred them from claiming compensatory damages.<sup>123</sup> This contention was rejected in *People's*

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<sup>115</sup> *Id.* at 920-22.

<sup>116</sup> *E.g.*, *Sheffield Div., Armco Steel Corp. v. Jones*, 376 S.W.2d 825 (Tex. 1964).

<sup>117</sup> *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981).

<sup>118</sup> *Id.* at 925. The jury returned a verdict of \$150,000, which the court of civil appeals reduced to \$100,000 to conform to plaintiff's pleading. *Id.* at 915.

<sup>119</sup> *Id.* at 922-23.

<sup>120</sup> See text accompanying note 110 *supra*.

<sup>121</sup> In 1943, for example, the Texas Supreme Court dismissed an action for punitive damages against an employer based on evidence very similar to that submitted in *Burk Royalty*. *Bennett v. Howard*, 141 Tex. 101, 170 S.W.2d 709 (1943) (worker killed by a gas pressure explosion or blowout in an oil well).

<sup>122</sup> *Nations & Bennett*, note 110 *supra*, at 434.

<sup>123</sup> *E.g.*, *People's Ice Co. v. Nowling*, 16 S.W.2d 976, 978 (Tex. Civ. App. 1929). These defendants claimed that only the plaintiffs who elected to bring an intentional tort action for compensatory damages, instead of collecting workers' compensation benefits, could sue for punitive damages. See generally *Nations & Bennett*, note 110 *supra*, at 432.

*Ice Co. v. Nowling*,<sup>124</sup> in which the court correctly observed: “[The rule] means that where the cause of action asserted . . . is not sufficient to support a recovery of actual damages, then no recovery of exemplary damages can be had,” and does not mean that both compensatory and punitive damages “must invariably be recovered in the same suit.”<sup>125</sup> Thus, it appeared for a short time that Texas would permit workers’ compensation plaintiffs to recover punitive damages without proof of compensatory damages. However, Texas courts have also ruled that exemplary damages must be reasonably proportioned to the actual damages found.<sup>126</sup> In *Fort Worth Elevators Co. v. Russell*,<sup>127</sup> the court decided to apply this rule in actions brought under the Texas statute. As a result, plaintiffs are required to prove compensatory damages and the jury must assess the amount of such damages, even though the judgment is exclusively for punitive damages.<sup>128</sup>

The advantage of the Texas statute is that it draws a clear distinction between 1) the compensatory and 2) the punitive and deterrent functions of tort law. The workers’ compensation act becomes the sole source of compensation, thereby limiting the employer’s liability for compensatory damages. Punitive damages become the sole remedy for punishing or deterring employer misconduct. The simplicity of this scheme is appealing. The disadvantage of the Texas approach is that punitive damages are awarded in a vacuum, since compensatory damages are no longer a part of the verdict. To overcome this problem, the Texas courts continue to require proof of compensatory damages, even though the judgment is exclusively for punitive damages. A simpler resolution of the problem would be to adopt the New Zealand approach, and permit the recovery of punitive damages based upon proof of nominal damages or proof that actual harm was sustained.<sup>129</sup> The amount of

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<sup>124</sup> 16 S.W.2d 976, 978-79 (Tex. Civ. App. 1929).

<sup>125</sup> *Id.* at 979.

<sup>126</sup> *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 150, 70 S.W.2d 397, 409 (1934).

<sup>127</sup> 123 Tex. 128, 150, 70 S.W.2d 397, 409 (1934).

<sup>128</sup> *E.g.*, *Sheffield Div., Armco Steel Corp. v. Jones*, 369 S.W.2d 71, 82-83 (Tex. Civ. App. 1963), *aff’d on other grounds*, 376 S.W.2d 825 (Tex. 1964) (reversing punitive damages judgment for the plaintiff because the jury erroneously had been informed that the plaintiff would receive only the punitive, and not the actual, damages assessed by the jury).

<sup>129</sup> See text accompanying notes 86-88 *supra*. Cases that permit the recovery of punitive damages based solely upon proof of nominal damages are collected in Annot., 17 A.L.R.2d 527, §§ 3, 6 (1951). For an analysis of existing case law, which concludes that only two jurisdictions have held or implied that a finding of nominal damages will be insufficient to support a punitive award, see J. GHIARDI & J. KIRCHER, PUNITIVE

the punitive award would then be assessed exclusively with reference to the nature of the defendant's conduct and the value of the defendant's assets.<sup>130</sup>

A possible alternative to permitting recovery of punitive damages in tort would be to award them in workers' compensation proceedings. But both courts<sup>131</sup> and commentators<sup>132</sup> have stated that it would be inappropriate to introduce this element of tort liability into no-fault proceedings. Instead, legislatures in several states have imposed percentage penalties on employers in the form of additional compensation for various kinds of misconduct.<sup>133</sup> For example, California employers are subject to a fifty percent penalty if they engage in "serious and willful" misconduct.<sup>134</sup> In most other jurisdictions, the penalties range from ten percent to fifteen percent of the benefits awarded.<sup>135</sup> Although these statutory fines serve important deterrent and punitive functions, they are not to be confused with punitive damages. The amount of the statutory penalty is determined by the value of the employee's benefits, whereas punitive damages are assessed commensurate with the defen-

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DAMAGES LAW AND PRACTICE § 5.37 (1981) [hereafter J. GHIARDI & J. KIRCHER]. For a criticism of California's adherence to the rule that punitive damages must bear a reasonable relationship to compensatory damages, see Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823 (1978).

<sup>130</sup> See text accompanying notes 89-90 *supra*. These two criteria have always been recognized as the primary factors to be considered in awarding punitive damages. D. DOBBS, note 106 *supra*, § 3.9 at 218; J. GHIARDI & J. KIRCHER, note 129 *supra*, §§ 5.01-5.04, 5.35-5.37; K. REDDEN, PUNITIVE DAMAGES §§ 3.5(A), 3.5(C) (1980 & Supp. 1982) [hereafter K. REDDEN]. For a cogent criticism of the rule that the punitive award must be commensurate with the compensatory award, see D. DOBBS, note 106 *supra*, § 3.9 at 210-11.

<sup>131</sup> *E.g.*, *Liberty Mut. Ins. Co. v. Stevenson*, 368 S.W.2d 760, 763 (Tenn. 1963).

<sup>132</sup> *E.g.*, 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.30, at 12-18 (1982).

<sup>133</sup> *Id.* at § 69.10.

<sup>134</sup> CAL. LAB. CODE § 4553 (West Supp. 1983). Massachusetts imposes an even more substantial 100% penalty for serious and willful misconduct. MASS. GEN. LAWS ANN. ch. 152, § 28 (West 1958).

<sup>135</sup> *E.g.*, KY. REV. STAT. ANN. § 342.165 (Baldwin 1979) (15%); MO. ANN. STAT. § 287.120(4) (Vernon Supp. 1980) (15%); N.M. STAT. ANN. § 52-1-10(B) (1978) (10%); N.C. GEN. STAT. § 97-12 (1979) (10%); OHIO CONST. art. II, § 35 (15-50% in discretion of board); S.C. CODE § 42-9-70 (1976) (10%); UTAH CODE ANN. §35-1-12 (1953) (15%); WIS. STAT. ANN. § 102.57 (West Supp. 1982) (15%, but no more than \$10,000).

dant's wealth and the egregiousness of the defendant's conduct.<sup>136</sup>

## 2. Intentional Tort or Recklessness Actions for Punitive Damages in Addition to Workers' Compensation

A few courts<sup>137</sup> and legislatures<sup>138</sup> in the United States permit an employee to bring an intentional tort or recklessness action in addition to a claim for workers' compensation benefits. In these jurisdictions, plaintiffs may recover not only punitive damages, but also compensatory damages, with an off-set for workers' compensation benefits. Thus these jurisdictions recognize a cumulative *cause of action* for both compensatory and punitive damages, whereas New Zealand and Texas create a cumulative *remedy* for punitive damages alone.

### a. Statutory Cause of Action: Oregon, Washington, and West Virginia

Three states have passed the following type of legislation authorizing employees to bring tort actions in addition to receiving workers' compensation benefits:

If injury or death result to any employee from the *deliberate intention* of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of 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.<sup>139</sup>

These statutes enhance the deterrent impact of the tort remedy by permitting the plaintiff to sue for both compensatory and punitive damages. This obviates an analysis of whether punitive damages are recoverable without proof of compensatory damages,<sup>140</sup> because both remedies may be obtained in the same action. The critical question for plaintiffs seeking punitive damages under these statutes is the meaning of the phrase "deliberate intention."

Two jurisdictions, Oregon and Washington, have adopted a highly

<sup>136</sup> E. Clemens Horst Co. v. Industrial Accident Comm'n, 184 Cal. 180, 192-93, 193 P. 105, 110 (1920) (California workers' compensation penalty is compensatory, not punitive, and is therefore constitutional). See generally D. DOBBS, note 106 *supra*, § 3.9.

<sup>137</sup> E.g., Johns-Manville Prods. Corp. v. Superior Ct., 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

<sup>138</sup> E.g., LA. REV. STAT. ANN. § 23:1032 (West Supp. 1982).

<sup>139</sup> W. VA. CODE § 23-4-2 (1981) (emphasis added). Accord OR. REV. STAT. § 656.156 (1981); WASH. REV. CODE ANN. § 51.24.020 (Supp. 1982).

<sup>140</sup> See text accompanying notes 86-88, 122-28 *supra*.

restrictive definition of the term, concluding that an employer acts with "deliberate intention to produce injury" only if the employer acts for the specific purpose of causing harm.<sup>141</sup> Plaintiffs have succeeded in meeting this test only twice, by proving in one case that the defendant set a spring gun aimed to cause serious bodily harm;<sup>142</sup> and by proving in another case that the defendant struck an employee in the face with a water pitcher.<sup>143</sup> Oregon and Washington courts have refused to allow tort actions based on the doctrine of constructive intent<sup>144</sup> or upon a showing of recklessness.<sup>145</sup> Plaintiffs also have been denied relief despite allegations of previous injury by the same machine<sup>146</sup> or of the employer's failure to fix known defects.<sup>147</sup>

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<sup>141</sup> *Jenkins v. Carman Mfg. Co.*, 79 Or. 448, 453-54, 155 P. 703, 705 (1916) (defendant was aware of and failed to repair defect in conveyor belt that caused piece of lumber to strike plaintiff; demurrer to complaint sustained for failure to allege deliberate intention). The court defined "deliberate intention" as "prolonged premeditation," and said:

We think by the words 'deliberate intention to produce injury' that the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross.

*Id.* *Accord* *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 205 P. 379 (1922) (defendant knew of defect in boiler that exploded, injuring plaintiff; complaint dismissed).

<sup>142</sup> *Weis v. Allen*, 147 Or. 670, 35 P.2d 478 (1934) (judgment for both compensatory and punitive damages).

<sup>143</sup> *Perry v. Beverage*, 121 Wash. 652, 209 P. 1102 (1922), *rev'd on other grounds*, 214 P. 146 (1923) (plaintiff established deliberate intention, but judgment for plaintiff reversed because of failure to plead and prove amount of workers' compensation offset). *See also* *Bibby v. Hillstrom*, 260 Or. 367, 490 P.2d 161 (1971) (judgment for defendant in assault and battery action reversed on grounds that judge, not jury, should have heard evidence regarding offset).

<sup>144</sup> *E.g.*, *Higley v. Weyerhaeuser Co.*, 13 Wash. App. 269, 534 P.2d 596 (1975); *Winterroth v. Meats, Inc.*, 10 Wash. App. 7, 516 P.2d 522 (1973).

<sup>145</sup> *E.g.*, *Duk Hwan Chung v. Fred Meyer, Inc.*, 276 Or. 809, 556 P.2d 683 (1976); *Caline v. Maede*, 239 Or. 132, 396 P.2d 694 (1964); *Heikkila v. Ewen Transfer Co.*, 135 Or. 631, 297 P. 373 (1931); *Foster v. Allsop Automatic, Inc.*, 86 Wash. 2d 579, 547 P.2d 856 (1976); *Biggs v. Donovan-Corkery Logging Co.*, 185 Wash. 284, 54 P.2d 235 (1936); *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 205 P. 379 (1922); *Peterick v. State*, 22 Wash. App. 163, 589 P.2d 250 (1978).

Oregon has also refused to impose liability upon an employer who ratified the intentional tort of battery by a security officer. *Bakker v. Baza'r, Inc.*, 275 Or. 245, 551 P.2d 1269 (1976).

<sup>146</sup> *E.g.*, *Caline v. Maede*, 239 Or. 132, 396 P.2d 694 (1964).

<sup>147</sup> *E.g.*, *Jenkins v. Carman Mfg. Co.*, 79 Or. 448, 155 P. 703 (1916); *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 205 P. 379 (1922); *Winterroth v. Meats, Inc.*,

Because employers rarely act for the specific purpose of causing harm to their employees, the punitive and deterrent impact of the Oregon and Washington statutes has been severely restricted. Plaintiffs have asked the courts to reconsider their narrow definition of the phrase "deliberate intention."<sup>148</sup> The courts have declined, however, on the grounds that their long-standing judicial construction is now part of the statute, and that only the legislature can broaden the definition of "deliberate intention."<sup>149</sup>

In contrast, the West Virginia Supreme Court, construing a deliberate intention statute exactly like Oregon's and Washington's,<sup>150</sup> has held that the statute permits recovery for both intentional torts (as defined by the *Restatement of Torts*)<sup>151</sup> and recklessness.<sup>152</sup> The court re-

10 Wash. App. 7, 516 P.2d 522 (1973).

<sup>148</sup> E.g., *Winterroth v. Meats, Inc.*, 10 Wash. App. 7, 516 P.2d 522 (1973).

<sup>149</sup> *Foster v. Allsop Automatic, Inc.*, 86 Wash. 2d 579, 583, 547 P.2d 856, 858 (1976); *Winterroth v. Meats, Inc.*, 10 Wash. App. 7, 13, 516 P.2d 522, 525 (1973).

<sup>150</sup> See text accompanying note 139 *supra*.

<sup>151</sup> *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 914 (W. Va. 1978). The Restatement says that a person acts intentionally when he or she "desires to cause the consequences" of his or her act, or "believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1965).

<sup>152</sup> *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 914 (W. Va. 1978). Compare text accompanying notes 141-47 *supra*.

The Supreme Court of Appeals of West Virginia has vacillated on the definition of "deliberate intention." *Mandolidis*, 246 S.E.2d at 911-13. In the first case decided under the statute, the court rejected the restrictive definition adopted by the Oregon and Washington courts. *Collins v. Dravo*, 114 W. Va. 229, 171 S.E. 757 (1933) (plaintiff stated cause of action by alleging that defendant knew overhanging bank had previously caved in and would probably do so again, yet ordered plaintiff to work in this "death trap"). But three years later, the court defined "deliberate intention" as a "specific intent . . . to cause the injury." *Allen v. Raleigh-Wyoming Mining Co.*, 117 W. Va. 631, 634, 186 S.E. 612, 614 (1936) (defendant replaced canvas trapdoor across track in coalmine with wooden trapdoor, but allegedly did not warn plaintiff, and plaintiff was struck by wooden trapdoor while riding at front of empty mine cars; judgment for plaintiff reversed). Accord *Brewer v. Appalachian Constructors, Inc.*, 135 W. Va. 739, 750, 65 S.E.2d 87, 94 (1951). In *Mandolidis*, the court returned to the more liberal *Collins* definition because it believed that "reading the language of the provision under review here to mean the same thing as similar wording in a criminal statute defining murder is contrary to the basic rules governing the construction of workmen's compensation statutes." 245 S.E.2d at 913.

While this article was in press, the West Virginia Legislature passed an amendment to section 23-4-2 of the West Virginia code, nullifying the *Mandolidis* definition of "deliberate intention." Enrolled Comm. Substitute for H.B. 1201, 66th Leg., 1983 Regular Sess. (to be codified at W. VA. CODE § 23-4-2(c)). The amendment provides that the "deliberate intention" standard "requires a showing of an actual, specific intent" and may not be satisfied by proof of recklessness. *Id.* (to be codified at W. VA.



fused to believe that the legislature intended to give entrepreneurs the right to "carry on their enterprises without any regard to the life and limb of the participants in the endeavor and free from all common law liability."<sup>153</sup> Therefore, in *Mandolidis v. Elkins Industries, Inc.*,<sup>154</sup> the court concluded that an employer's misconduct will remove the immunity bar if it is undertaken with a knowledge and an appreciation of the high degree of risk of physical harm to another created by the misconduct. The court distinguished recklessness from nonactionable negligence, saying that "[l]iability will require 'a strong probability that harm may result.'"<sup>155</sup> The plaintiff in *Mandolidis* lost two fingers in the defendant's unguarded table saw blade.<sup>156</sup> The court reversed a summary judgment for the defendant,<sup>157</sup> finding that the plaintiff had established sufficient facts to permit an inference that the defendant had known the unguarded saw blades were in violation of safety regulations and had caused previous injuries, but had ordered the plaintiff to operate the saw without safety guards to improve production speed and thus increase profits.<sup>158</sup>

*Mandolidis* gives maximum effect to the punitive and deterrent functions of tort law because it permits common law actions whenever punitive damages are potentially recoverable.<sup>159</sup> No longer may employers

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CODE § 23-4-2(c)(2)(i)).

<sup>153</sup> *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 913 (W. Va. 1978).

<sup>154</sup> 246 S.E.2d 907, 914 (W. Va. 1978).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 918.

<sup>158</sup> *Id.* at 914-18. Two other cases were consolidated with *Mandolidis*. In *Snodgrass v. United States Steel Corp.*, the court reversed a summary judgment for the defendant, holding that the plaintiff had established sufficient facts to permit an inference that the defendant had deliberately violated occupational safety and building construction standards. *Id.* at 918-19. In *Dishmon v. Eastern Assoc. Coal Corp.*, the court held that the plaintiff had stated a cause of action by alleging that the defendant had knowingly allowed employees to work in conditions that were in violation of roof support regulations for coal mines. *Id.* at 919-21. *Mandolidis* requires subjective knowledge of the danger, which means that neither negligence nor gross negligence will suffice. *Smith v. ACF Indus., Inc.*, 687 F.2d 40 (4th Cir. 1982) (applying West Virginia law to reverse trial court's denial of directed verdict for defendant who had no notice that machinery would cause serious injury).

<sup>159</sup> Punitive damages are recoverable upon proof of either malice or conscious disregard for the safety of others. D. DOBBS, note 106 *supra*, § 3.9 at 205-06; J. GHIARDI & J. KIRCHER, note 129 *supra*, §§ 5.01-.04. For a collection of the judicial or legislative definitions of the state of mind required to award punitive damages in each of the jurisdictions which permits recovery of such damages, see J. GHIARDI & J. KIRCHER, note 129 *supra*, § 5.01.

in West Virginia knowingly disregard safety statutes and warnings with impunity. On the other hand, critics argue that the decision will subject employers to a flood of litigation and will require them to carry liability insurance for their reckless acts.<sup>160</sup> Not only will suits be filed by employees, but employers will also be subject to actions for contribution. For example, in *Sydenstricker v. Unipunch Products, Inc.*,<sup>161</sup> the manufacturers of allegedly defective industrial equipment, who had been sued by injured employees, were permitted to seek contribution from the allegedly reckless employer on a concurrent tortfeasor theory.

In assessing the negative ramifications of *Mandolidis*, it is important to realize that only the employer's liability for *compensatory* damages subjects the employer to contribution actions by third-party defendants. Most jurisdictions prohibit joint and several liability for punitive damages, and instead assess them separately against each individual defendant. Therefore, contribution for punitive damages is inappropriate.<sup>162</sup> Similarly, the employer's liability for compensatory damages necessitates the purchase of insurance. Many jurisdictions have prohibited insurance coverage of punitive damages as a matter of public policy, and West Virginia could adopt this approach either by statute or by judicial decision.<sup>163</sup> Thus, if employers were liable in tort for punitive damages

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The West Virginia Legislature's 1983 amendment to W. VA. CODE § 23-4-2 continues to permit common law actions for compensatory damages against employers who act with a deliberate intention to injure or kill an employee. However, the amendment bars the recovery of punitive damages altogether. Enrolled Comm. Substitute for H.B. 1201, 66th Leg., 1983 Regular Sess. (to be codified at W. VA. CODE § 23-4-2(c)(2)(iii)(A)). The amendment is thus contrary to the recommendations in the text accompanying notes 162-63 *infra*.

<sup>160</sup> Note, *Employer Liability in West Virginia: Compensation Beyond the Law*, 36 WASH. & LEE L. REV. 151 (1979) (criticizes court for vacillating in its definition of "deliberate intention" and recommends that legislature adopt workers' compensation penalty instead of authorizing common law tort against employer who engages in reckless misconduct).

<sup>161</sup> 288 S.E.2d 511 (W. Va. 1982).

<sup>162</sup> For cases assessing punitive damages against joint tortfeasors on an individual basis, see *Thomson v. Catalina*, 205 Cal. 402, 271 P. 198 (1928); *Fredeen v. Stride*, 269 Or. 369, 525 P.2d 166 (1974) (overruling prior cases that required assessment of single punitive award against joint tortfeasors); *Huckeby v. Spangler*, 563 S.W.2d 555, 559-60 (Tenn. 1978) (apportionment of punitive damages emphasizes the penal and deterrent nature of exemplary damages). See also Note, *Apportionment of Punitive Damages*, 38 VA. L. REV. 71 (1952); Annot., 20 A.L.R.3d 666 (1968).

<sup>163</sup> D. DOBBS, note 106 *supra*, § 3.9 at 216-17; J. GHIARDI & J. KIRCHER, note 129 *supra*, §§ 7.11, 7.13; K. REDDEN, note 130 *supra*, §§ 9.1, 9.4-5; Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431 (1976); Annot., 16 A.L.R.4th 11, § 3 (1982). Prohibiting insurance coverage advances the punitive and

only, as in New Zealand and Texas, the problems created by contribution actions and insurance coverage could be eliminated. Furthermore, because plaintiffs would have less incentive to sue, the flood of litigation might be reduced. Tort liability would then be imposed strictly to deter and punish the employer's egregious misconduct, while workers' compensation benefits would be the sole source of compensation.

*b. Judicially Created Cause of Action: California*

Most jurisdictions authorizing cumulative tort actions against employers have enacted legislation to that effect.<sup>164</sup> In California, however, cumulative remedies have been sanctioned in certain circumstances by judicial opinion.<sup>165</sup> The leading opinion is *Johns-Manville Products*

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deterrent functions of the punitive damages award because the defendant cannot shift the loss to the insurance company. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1313 (1976) (recommending that punitive damages not be insurable in products liability litigation). Some jurisdictions permit insurance coverage of punitive damages, but primarily in cases of grossly negligent or reckless (as opposed to intentional) misconduct and in cases of vicarious liability (as opposed to liability based on complicity). D. DOBBS, note 106 *supra*, § 3.9 at 216-17; J. GHIARDI & J. KIRCHER, note 129 *supra*, §§ 7.12, 7.14; K. REDDEN, note 130 *supra*, §§ 9.4-.5; Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 241-43 (1977-78); Note, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 CUM. L. REV. 487 (1978); Annot., 16 A.L.R.4th 11 (1982). It would seem appropriate to prohibit insurance coverage of punitive damages in actions against employers for work-related injuries, since liability is either direct or based on complicity and imposed only upon proof of intent to harm or conscious disregard of safety. See generally J. GHIARDI & J. KIRCHER, note 129 *supra*, §§ 5.05-.14. Under analogous circumstances, the California Legislature has prohibited insurance coverage of the workers' compensation statutory penalty. CAL. INS. CODE § 11661 (West 1972).

<sup>164</sup> See text accompanying notes 139-40 *supra*.

<sup>165</sup> *Johns-Manville Prods. Corp. v. Superior Ct.*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (employer deliberately concealed work-related disease, thereby aggravating employee's injury); *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (workers' compensation insurance carrier, which enjoyed employer's immunity under California workers' compensation legislation, committed assault, battery and intentional infliction of emotional distress on employee; "dual capacity" theory of liability); *Meyer v. Graphic Arts Int'l Union*, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (2d Dist. 1979) (employer's agent raped employee); *Magliulo v. Superior Ct.*, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1st Dist. 1975) (employer assaulted and battered employee).

For a discussion of the California cases governing an employer's liability for committing an intentional tort, see 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 22.02[3] (2d ed. 1982); J. MASTORIS, CIVIL LITIGATION AND WORKERS' COMPENSATION 1-14 (1980); Demler, *Remedy for the Intentional Torts of a Workmen's Compensation Carrier*, 1 PEPPERDINE L. REV. 54 (1973);

*Corp. v. Superior Court*,<sup>166</sup> in which the plaintiff-employee sued his employer for compensatory and punitive damages, alleging that the defendant had fraudulently concealed from him (and the company doctor)

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Tomita, *The Exclusive Remedy of Workers' Compensation for Intentional Torts of the Employer*: Johns-Manville Products v. Superior Court, 18 CAL. W.L. REV. 27 (1981); Comment, Johns-Manville Products Corp. v Superior Court: *The Not-So-Exclusive Remedy Rule*, 33 HASTINGS L.J. 263 (1981); Comment: Azevedo v. Abel: *Denial of Employee's Right to Sue His Employer for an Intentional Tort*, 21 HASTINGS L.J. 683 (1970); Comment, *Intentional Employer Torts and Workers' Compensation: A Legal Morass*, 11 PAC. L.J. 187 (1979); Comment, Johns-Manville v. Superior Court: *Employee's Right to Sue Employer for Aggravating an Industrial Disease*, 14 U.C. DAVIS L. REV. 767 (1981); Comment, *Intentional Employer Torts: A Matter for the California Legislature*, 15 U.S.F.L. REV. 651 (1981); Annot., 9 A.L.R.4th 778 (1981).

The California Legislature recently amended the workers' compensation statute to provide for a cumulative tort action against employers under specified circumstances:

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

(b) An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:

(1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.

(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.

(3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

(c) In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted.

Act of Sept. 10, 1982, ch. 922, § 6, 1982 Cal. Legis. Serv. 4949 (West) (to be codified at CAL. LAB. CODE § 3602). The statute codifies those cases discussed in this section which authorize a cumulative tort action.

<sup>166</sup> 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

that the plaintiff was suffering from asbestosis. This concealment allegedly prevented the plaintiff from receiving treatment for the disease, and induced him to continue to work in an unsafe environment. The California Supreme Court permitted the tort action to proceed despite the plaintiff's pending application for workers' compensation benefits.<sup>167</sup> The court held that the employer should be allowed a set-off if the plaintiff were awarded disability benefits.<sup>168</sup>

In determining whether to allow the tort action in *Johns-Manville*, the court reviewed the California workers' compensation act, observing that victims of "serious and willful misconduct" could recover not only compensatory benefits, but also a penalty equal to fifty percent of the compensatory benefits.<sup>169</sup> Based on this, the court concluded that the legislature must have intended the act to cover injuries caused by an employer's reckless or intentional misconduct.<sup>170</sup> The court then observed that the act contained an exclusive remedy clause, which provided:

Where the conditions of compensation exist, the right to recover such compensation . . . is . . . the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment, except that an employee, or his dependents in the event of his death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against such other employee, as if this division did not apply, in either of the following cases:

- (1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee.
- (2) When the injury or death is proximately caused by the intoxication

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<sup>167</sup> *Id.* at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

<sup>168</sup> *Id.* at 479, 612 P.2d at 956, 165 Cal. Rptr. at 866.

<sup>169</sup> CAL. LAB. CODE § 4553 (West Supp. 1982). Section 4553 has been amended to provide:

The amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars (\$250), where the employee is injured by reason of the serious and willful misconduct of any of the following:

- (a) The employer, or his managing representative.
- (b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.
- (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

Act of Sept. 10, 1982, ch. 922, § 10, 1982 Cal. Legis. Serv. 4949, 4950 (West) (to be codified at CAL. LAB. CODE § 4553).

<sup>170</sup> *Johns-Manville Prods. Corp. v. Superior Ct.*, 27 Cal. 3d 465, 473, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980).

of such other employee.<sup>171</sup>

On its face, the exclusive remedy provision appeared to create a blanket immunity for the employer. However, the *Johns-Manville* court reviewed prior cases<sup>172</sup> and discovered that "in some exceptional circumstances" the employer is not free from tort liability for its intentional acts, even if the resulting injuries to its employees are compensable under workers' compensation.<sup>173</sup>

The court classified the "exceptional circumstances" as cases in which "the employer acts deliberately for the purpose of injuring the employee" and in which "the harm resulting from the intentional misconduct consists of aggravating an initial work-related injury."<sup>174</sup> The court concluded that the plaintiff was entitled to bring a cumulative tort action for fraud, based on the allegations that the employer had deliberately concealed the existence of the employee's disease and had thereby aggravated it.<sup>175</sup> The court was unwilling to believe that the legislature had intended for the exclusive remedy clause "to insulate such flagrant conduct from tort liability."<sup>176</sup>

The California Supreme Court explicitly declined to decide whether its holding in *Johns-Manville* should be extended to encompass assault and battery or other intentional torts.<sup>177</sup> However, the *Johns-Manville* court did rely heavily<sup>178</sup> on *Magliulo v. Superior Court*,<sup>179</sup> a case in which a waitress sued her employer for assault and battery. The employer had hit the waitress and thrown her to the ground in a fit of

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<sup>171</sup> CAL. LAB. CODE § 3601 (West Supp. 1982). Section 3601 has been amended to apply exclusively to actions against co-employees. Act of Sept. 10, 1982, ch. 922, § 5, 1982 Cal. Legis. Serv. 4948, 4949 (West) (to be codified at CAL. LAB. CODE § 3601). Actions against employers are now governed by Section 3602, *quoted in* note 165 *supra*.

<sup>172</sup> See cases cited in note 165 *supra*.

<sup>173</sup> *Johns-Manville Prods. Corp. v. Superior Ct.*, 27 Cal. 3d 465, 473, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980).

<sup>174</sup> *Id.* at 476, 612 P.2d at 955, 165 Cal. Rptr. at 865.

<sup>175</sup> *Id.* at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865.

<sup>176</sup> *Id.* at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

<sup>177</sup> *Id.* at 477 n.11, 612 P.2d at 956 n.11, 165 Cal. Rptr. at 865 n.11. For a discussion of this question, see Comment, *Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule*, 33 HASTINGS L.J. 263 (1981); Comment, *Intentional Employer Torts: A Matter for the California Legislature*, 15 U.S.F.L. REV. 651 (1981).

<sup>178</sup> *Johns-Manville Prods. Corp. v. Superior Ct.*, 27 Cal. 3d 465, 475-77, 612 P.2d 948, 954-56, 165 Cal. Rptr. 858, 864-65 (1980).

<sup>179</sup> 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1st Dist. 1975).

anger, causing injuries to her back.<sup>180</sup> The *Magliulo* court observed that had the employer been a co-employee, the workers' compensation statute would have permitted the plaintiff to sue him in addition to receiving disability benefits.<sup>181</sup> Because a cumulative tort remedy would have been available to the plaintiff against the defendant as a co-employee, the court held that the legislature must also have intended to authorize a cumulative tort remedy against the defendant as an employer:<sup>182</sup> "If the employee can recover both compensation and damages caused by an intentional assault by a fellow worker, he should have no less right because the fellow worker happens to be his boss."<sup>183</sup>

At the core of the *Johns-Manville* and *Magliulo* decisions is the conviction that, although employees are "willing to surrender [their rights] to an action at common law for the ordinary type of work-related injuries,"<sup>184</sup> they never contemplated losing their common law remedies for such flagrant employer misconduct as battery<sup>185</sup> or the intentional concealment of knowledge that the employee had contracted a serious disease from the work environment.<sup>186</sup> Other California cases have characterized the employer who deliberately acts to injure an employee as acting "outside the scope of employment."<sup>187</sup> Under these decisions, the

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<sup>180</sup> *Id.* at 763, 121 Cal. Rptr. at 624.

<sup>181</sup> CAL. LAB. CODE § 3601(1) (West Supp. 1982), *quoted in text* accompanying note 171 *supra*.

Approximately twelve other jurisdictions that have immunized co-employees permit intentional tort actions to be brought against them. See 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 72.21, 72.26 (1982); Annot., 21 A.L.R.3d 845, §§ 10-11 (1968). The Alaska Supreme Court has authorized a cumulative intentional tort action against co-employees on a theory that could be extended to employers as well. *Elliot v. Brown*, 569 P.2d 1323 (Alaska 1977).

<sup>182</sup> *Magliulo v. Superior Ct.*, 47 Cal. App. 3d 760, 772-73, 121 Cal. Rptr. 621, 630-31 (1st Dist. 1975).

<sup>183</sup> *Id.* at 773, 121 Cal. Rptr. at 631.

<sup>184</sup> *Johns-Manville Prods. Corp. v. Superior Ct.*, 27 Cal. 3d 465, 477, 612 P.2d 948, 955, 165 Cal. Rptr. 858, 865 (1980).

<sup>185</sup> *Magliulo v. Superior Ct.*, 47 Cal. App. 3d 760, 778, 121 Cal. Rptr. 621, 635 (1st Dist. 1975).

<sup>186</sup> *Johns-Manville Prods. Corp. v. Superior Ct.*, 27 Cal. 3d 465, 477, 612 P.2d 948, 955-56, 165 Cal. Rptr. 858, 865 (1980).

<sup>187</sup> *E.g.*, *Busick v. Workmen's Comp. Appeals Bd.*, 7 Cal. 3d 967, 500 P.2d 1386, 104 Cal. Rptr. 42 (1972) (affirming \$500,000 compensatory damages and \$150,000 punitive damages award to employee who was shot by employer, but dismissing plaintiff's claim for workers' compensation benefits; dissenting judge would have permitted recovery of both tort damages and benefits because plaintiff would have been entitled to both in action against co-employee).

plaintiff has two alternative or mutually exclusive remedies:<sup>188</sup> workers' compensation for ordinary, work-related injuries and tort liability for flagrant misconduct.<sup>189</sup> The advantage of the cumulative tort action in *Johns-Manville* and *Magliulo* is that the plaintiff can obtain prompt payment of workers' compensation benefits and retain the right to sue the employer for compensatory and punitive damages.<sup>190</sup>

### 3. Intentional Tort or Recklessness Actions for Punitive Damages in Lieu of Workers' Compensation

Although the recognition of a cumulative tort cause of action is advantageous to the worker and procedurally convenient, most jurisdictions have authorized instead an alternative cause of action.<sup>191</sup> In these states, the injured worker may receive either workers' compensation

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<sup>188</sup> *Id.*; *Eckis v. Sea World Corp.*, 64 Cal. App. 3d 1, 134 Cal. Rptr. 183 (4th Dist. 1976) (secretary injured while riding a whale was acting within scope of employment; tort judgment for plaintiff based on fraud reversed); *Azevedo v. Abel*, 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (3d Dist. 1968) (affirming award of workers' compensation benefits to victim of intentional assault and battery by employer; dismissal of tort action affirmed); *Carter v. Superior Ct.*, 142 Cal. App. 2d 350, 298 P.2d 598 (2d Dist. 1956) (plaintiff who had received workers' compensation benefits for intentional assault by employer could not subsequently file tort action for compensatory and punitive damages). For a discussion of the alternative tort cause of action authorized by these cases, see text accompanying notes 191-267 *infra*.

<sup>189</sup> An employer who is sued in tort and who wishes to assert that the exclusive remedy clause bars the plaintiff's recovery must assert the affirmative defense in the answer, and cannot raise it for the first time on appeal. *Doney v. Tambouratgis*, 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979) (employer sexually assaulted and battered employee; judgment for \$3945 compensatory and \$12,500 punitive damages affirmed).

<sup>190</sup> Several commentators have recommended the recognition of a cumulative tort cause of action. See, e.g., Marcus, *Advocating the Rights of the Injured*, 61 MICH. L. REV. 921 (1963); Comment, *Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule*, 33 HASTINGS L.J. 263 (1981); Comment, *Intentional Employer Torts: A Matter for the California Legislature*, 15 U.S.F.L. REV. 651 (1981).

<sup>191</sup> For a discussion of the alternative tort action, see 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 67.22, 68.11-23 (1982); Birnbaum & Wrubel, *Workers' Compensation and the Employer's Immunity Shield: Recent Exceptions to Exclusivity*, 5 J. PRODS. LIAB. 119, 119-32 (1982); Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. IND. & COM. L. REV. 555, 559-67 (1963); Schmidt & German, *Employer Misconduct as Affecting the Exclusiveness of Workmen's Compensation*, 18 U. PITT. L. REV. 81 (1956); Note, *Workmen's Compensation: Employer Misconduct and the Exclusive Remedy*, 32 OKLA. L. REV. 704 (1979); Note, *Judicial Misapplication of the Indiana Workmen's Compensation Act to Injuries Resulting from Employer's Wilful Conduct*, 13 VAL. U.L. REV. 561 (1979); Annot., 96 A.L.R.3d 1064 (1979).



benefits or tort damages, but not both.

*a. Statutory Cause of Action*

Seven jurisdictions have statutes creating an alternative cause of action. Three states have worded their legislation to give the plaintiff an explicit option:

If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed

. . . .<sup>192</sup>

The other four states have created statutory exceptions to the exclusive remedy clause for "wilful or unprovoked physical aggression"<sup>193</sup> and intentional torts,<sup>194</sup> wrongs<sup>195</sup> or acts.<sup>196</sup>

For a plaintiff seeking punitive damages, the critical question is the meaning of the phrases "deliberate intention," "wilful misconduct," "wilful aggression," "intentional wrong" and "intentional act."<sup>197</sup> The cases indicate that the Arizona, Idaho and New Jersey courts have interpreted the phrases "wilful misconduct,"<sup>198</sup> "wilful aggression,"<sup>199</sup>

<sup>192</sup> KY. REV. STAT. ANN. § 342.610(4) (Baldwin 1979). *Accord* MD. ANN. CODE art. 101, § 44 (1957). The Arizona statute is worded somewhat differently:

A. The right to recover compensation pursuant to this chapter for injuries sustained by an employee . . . is the exclusive remedy against the employer . . . , 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 . . . .

B. "Wilful misconduct" as used in this section means an act done knowingly and purposely with the direct object of injuring another.

ARIZ. REV. STAT. ANN. § 23-1022 (1971).

<sup>193</sup> IDAHO CODE § 72-209 (1973).

<sup>194</sup> S.D. CODIFIED LAWS ANN. § 62-3-2 (1978).

<sup>195</sup> N.J. STAT. ANN. § 34:15-8 (West Supp. 1982).

<sup>196</sup> LA. REV. STAT. ANN. § 23:1032 (West Supp. 1982).

<sup>197</sup> For a discussion of the term "deliberate intention" as used in statutes creating a cumulative cause of action, see text accompanying notes 139-55 *supra*.

<sup>198</sup> *Serna v. Statewide Contractors, Inc.*, 6 Ariz. App. 12, 429 P.2d 504 (1967). *Accord* *Johnson v. Kerr-McGee Oil Indus., Inc.*, 129 Ariz. 393, 631 P.2d 548 (Ariz. Ct. App. 1981) (complaint dismissed despite allegations that employer fraudulently failed to warn employee of health hazards to which he would be exposed by uranium mining); *Lowery v. Universal Match Corp.*, 6 Ariz. App. 98, 430 P.2d 444 (1967) (summary judgment affirmed for defendant-employer alleged to have knowingly disregarded safety measures regarding chemicals and gases).

and "intentional wrong"<sup>200</sup> to mean "deliberate intention." Furthermore, the courts in Arizona,<sup>201</sup> Idaho,<sup>202</sup> Kentucky,<sup>203</sup> Maryland<sup>204</sup> and New Jersey<sup>205</sup> have adopted the "deliberate intention" test developed under the Oregon and Washington statutes.<sup>206</sup> As a result, the plaintiff must prove that the defendant acted for the specific purpose of causing harm, a burden which no plaintiff has met. Neither allegations of recklessness nor constructive intent will suffice. For example, in one of the more egregious cases, a widow was denied a tort remedy for the death of her husband, who was killed by the cave-in of a sandy ditch.<sup>207</sup> State safety inspectors had warned the employer that the sides of the ditch were not sloped properly.<sup>208</sup> Furthermore, the ditch had caved in once before on the victim.<sup>209</sup> The employer's conduct clearly would have satisfied West Virginia's definition of "deliberate intention,"<sup>210</sup> but did not meet the stringent criteria set by the Oregon and Washington courts.<sup>211</sup> Unless the courts or legislatures in these five jurisdictions modify the restrictive definition of "deliberate intention," their alternative tort actions will have only a slight punitive and deterrent impact.<sup>212</sup>

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<sup>199</sup> *Provo v. Bunker Hill Co.*, 393 F. Supp. 778, 782 n.1, 785-86 (D. Idaho 1975) (applying Idaho law in granting summary judgment for defendant-employer alleged to have known of prior incidents when molten zinc burst from uncovered pot, injuring other workers).

<sup>200</sup> *Bryan v. Jeffers*, 103 N.J. Super. 522, 248 A.2d 129 (1968) (per curiam).

<sup>201</sup> See cases cited in note 198 *supra*.

<sup>202</sup> See case cited in note 199 *supra*.

<sup>203</sup> *McCray v. Davis H. Elliott Co.*, 419 S.W.2d 542 (Ky. Ct. App. 1967) (summary judgment for defendant affirmed despite allegations that employer intentionally directed employee to work on a tall pole in extremely dangerous proximity to highly charged wire); *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25 (Ky. Ct. App. 1955) (complaint dismissed despite allegations that defendant had been notified that metal press which injured plaintiff was dangerous).

<sup>204</sup> *Schatz v. York Steak House Sys., Inc.*, 51 Md. App. 1045, 444 A.2d 1045 (1982) (summary judgment for defendant-employer affirmed; plaintiff had been raped by co-employee who was not "alter-ego" of employer, thus precluding imposition of vicarious liability).

<sup>205</sup> *Copeland v. Johns-Manville Prods. Corp.*, 492 F. Supp. 498 (D.N.J. 1980) (plaintiff denied leave to amend complaint to allege fraudulent concealment of exposure to asbestos on job); *Bryan v. Jeffers*, 103 N.J. Super. 522, 248 A.2d 129 (1968) (per curiam).

<sup>206</sup> See text accompanying notes 141-49 *supra*.

<sup>207</sup> *Serna v. Statewide Contractors, Inc.*, 6 Ariz. App. 12, 429 P.2d 504 (1967).

<sup>208</sup> *Id.* at 14, 429 P.2d at 506.

<sup>209</sup> *Id.* at 13, 429 P.2d at 505.

<sup>210</sup> See note 152 *supra*.

<sup>211</sup> See text accompanying notes 141-47 *supra*.

<sup>212</sup> There are no cases construing the South Dakota statute. S.D. CODIFIED LAWS

Louisiana has most recently recognized an employee's right to sue an employer in tort. In 1976, the legislature expanded the scope of the exclusive remedy clause to cover not only employers, but also co-employees, and simultaneously created the following exception: "Nothing in this Chapter shall affect the liability of the employer . . . or employee . . ., civil or criminal, resulting from an intentional act."<sup>213</sup> Initially, the intermediate appellate courts strictly construed this exception, and required proof that the defendant "consciously committed an act which the defendant actively desired *and* believed was substantially certain to result in injury to the employee."<sup>214</sup> Not surprisingly, plaintiffs' actions were consistently dismissed.<sup>215</sup> Then, in 1981, the Louisiana Supreme Court ruled that plaintiffs could recover based on proof of either deliberate or constructive intent:

The meaning of "intent" is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that that result is substantially certain to follow from his conduct, whatever his desire may be as to that result.<sup>216</sup>

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ANN. § 62-3-2 (1978).

<sup>213</sup> LA. REV. STAT. ANN. § 23:1032 (West Supp. 1982). For a discussion of the amendment to the statute, see W. MALONE, LOUISIANA CIVIL LAW TREATISE: WORKERS' COMPENSATION LAW & PRACTICE § 365 (2d ed. 1980 & Supp. 1982).

It is not clear from the language of the statute whether the legislature intended to create a cumulative or an alternative tort action. Most of the reported cases make no reference to the plaintiff having received workers' compensation benefits, and the statute does not provide for a set-off of workers' compensation benefits. *Compare* statute quoted in text accompanying note 139 *supra*. Therefore, for the purposes of this Article, the statute is being classified as creating an alternative cause of action. However, in *Rennier v. Johnson*, 410 So. 2d 1149 (La. Ct. App. 1981), a worker who had received workers' compensation benefits for an assault by a supervisory co-employee was permitted to proceed with an intentional tort action against the employer because he presented issues of fact concerning vicarious liability. *Rennier* did not explicitly discuss whether the statutory cause of action is cumulative or alternative, and ultimately the issue will have to be resolved by the Louisiana Supreme Court.

<sup>214</sup> *Johnson v. Chicago Mill & Lumber Co.*, 385 So. 2d 878 (La. Ct. App. 1980) (employer knowingly left firewood piled in dangerous manner, and pile collapsed, killing worker; summary judgment for defendant) (emphasis added).

<sup>215</sup> *E.g.*, *Crenshaw v. Service Painting Co.*, 394 So. 2d 706 (La. Ct. App. 1981) (employer knew that nearby sandblasting was causing sand to accumulate on scaffold, but failed to remove the sand and replace missing grates, causing deceased to fall; summary judgment for defendant); *Guidry v. Aetna Cas. & Sur. Co.*, 359 So. 2d 637 (La. Ct. App. 1978), *cert. denied*, 362 So. 2d 578 (La. 1978) (employer left sharp, pointed knife on shelf, facing outward, injuring employee's eye; complaint dismissed).

<sup>216</sup> *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1981) (complaint by worker against co-employee alleging only negligence failed to state cause of action). The court

It remains to be seen how broadly the Louisiana courts will construe the above-quoted test of constructive intent. One intermediate appellate court has held that a widow stated a cause of action by proving that the defendant ordered her husband, a maintenance supervisor, to be a security guard during a violent labor dispute.<sup>217</sup> Another court allowed the plaintiff to amend his complaint to allege that his employer knew that the business of manufacturing phenolic resin produced an excessive amount of highly volatile dust, knew that the machinery in the plant had become so worn that it produced sparks caused by friction, and therefore knew that a fire and explosion causing physical injury to the plaintiff were substantially certain to result.<sup>218</sup> On the other hand, the courts have dismissed complaints alleging that an employer knew of dangerous working conditions<sup>219</sup> or intentionally violated safety regulations.<sup>220</sup> Therefore, it appears that the Louisiana courts will adopt a liberal test of constructive intent, but will not permit actions for recklessness.<sup>221</sup>

Louisiana has set a useful precedent by authorizing an alternative cause of action based upon proof of either deliberate or constructive intent. There has been a disturbing tendency to pattern the statutes creating alternative causes of action after the legislation authorizing cumulative causes of action,<sup>222</sup> even though the actions are in fact very different. Cumulative causes of action provide compensatory and puni-

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explicitly rejected the restrictive test of intent which had been applied by the intermediate appellate courts. *Id.* at 482. The court also refused to define "intentional act" to encompass "gross negligence" because, before the Louisiana Legislature passed the amendment to the exclusive remedy statute, the legislature had rejected "broader penalties that would have provided double benefits for an employer's violation of a safety rule, failure to provide a safety device required by law, or gross negligence on the part of the supervisory employee . . ." *Id.* at 480.

<sup>217</sup> *Hurst v. Massey*, 411 So. 2d 622 (La. Ct. App. 1982).

<sup>218</sup> *Mayer v. Blue Cross Ins. Co.*, 402 So. 2d 273 (La. Ct. App. 1981).

<sup>219</sup> *McDonald v. Boh Bros. Constr. Co.*, 397 So. 2d 846 (La. Ct. App. 1981).

<sup>220</sup> *Cortez v. Hooker Chem. & Plastics Corp.*, 402 So. 2d 249 (La. Ct. App. 1981).

<sup>221</sup> *Brown v. P.S. & Sons Painting, Inc.*, 680 F.2d 1111 (5th Cir. 1982) (applying Louisiana law) (employer knew that he had purchased inferior pipe for scaffolding, but did not know that it would break, injuring plaintiff); *Jacobsen v. Southeast Distrib., Inc.*, 413 So. 2d 995 (La. Ct. App. 1982) (employer who refused to supply safety equipment to painter on swinging stage knew that an accident was "reasonably probable," but not "substantially certain"); *Reed v. Yor-Wil, Inc.*, 406 So. 2d 236 (La. Ct. App. 1981) (complaint alleging that employer knew or should have known that actions would cause injury to employee failed to state cause of action). *Compare* text accompanying notes 150-58 *supra*.

<sup>222</sup> *Compare* statute quoted in text accompanying note 139 *supra* with statute quoted in text accompanying note 192 *supra*.

tive damages in addition to workers' compensation benefits, and it may be appropriate to confine them to cases of more glaring employer misconduct. Alternative causes of action, on the other hand, are filed in lieu of workers' compensation benefits. If a highly restrictive test of intent is adopted, most injured employees will select workers' compensation benefits, rather than risk a failure to establish "deliberate intention."<sup>223</sup> Consequently, the "deliberate intention" test undermines the punitive and deterrent potential of the alternative tort cause of action.

### *b. Judicially Created Cause of Action*

Although only seven state legislatures have explicitly sanctioned an alternative tort cause of action,<sup>224</sup> many courts have independently authorized injured workers to sue their employers in lieu of receiving workers' compensation benefits.<sup>225</sup> These judicially created exceptions to the standard exclusive remedy provisions closely parallel the language of the statutes discussed above.<sup>226</sup> The vast majority of courts adhere to the "deliberate intention" test of the defendant's state of mind.<sup>227</sup> In the

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<sup>223</sup> The majority of courts have treated the employee's election as an election between two valid but inconsistent remedies. 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 67.31 (1982). In these jurisdictions, an unsuccessful damage suit does not bar a compensation claim. *Id.* Nevertheless, it substantially delays the filing of the claim and receipt of benefits.

<sup>224</sup> See text accompanying notes 192-96 *supra*.

<sup>225</sup> *E.g.*, *Griffin v. George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979); *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946); *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930); *Great Western Sugar Co. v. District Ct.*, 610 P.2d 717 (Mont. 1980); *De Coigne v. Ludlum Steel Co.*, 251 A.D. 662, 297 N.Y.S. 636 (1937); *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982); *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556 (1916) (injury, not death); *Kittell v. Vermont Weatherboard, Inc.*, 138 Vt. 439, 417 A.2d 926 (1980).

<sup>226</sup> See text accompanying notes 192, 213 *supra*.

<sup>227</sup> *E.g.*, *Houston v. Bechtel Assocs. Prof. Corp.*, 522 F. Supp. 1094, 1096 (D.D.C. 1981) (construing Longshoremen's and Harbor Workers' Compensation Act); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1229 (N.D. Ill. 1981); *Griffin v. George's, Inc.*, 267 Ark. 91, 96, 589 S.W.2d 24, 27 (1979); *Boek v. Wong Hing*, 180 Minn. 470, 471, 231 N.W. 233, 234 (1930); *Great Western Sugar Co. v. District Ct.*, 610 P.2d 717, 720 (Mont. 1980); *Kennecott Copper Corp. v. Reyes*, 75 Nev. 212, 215, 337 P.2d 624, 626 (1959); *Wilkinson v. Achber*, 101 N.H. 7, 10, 131 A.2d 51, 54 (1957); *Santiago v. Brill Monfort Co.*, 10 N.Y.2d 718, 176 N.E.2d 835, 219 N.Y.S.2d 266 (1961); *Readinger v. Gottschall*, 201 Pa. Super. 134, 137, 191 A.2d 694, 696 (1963); *Kittell v. Vermont Weatherboard, Inc.*, 138 Vt. 439, 441, 417 A.2d 926, 927 (1980). *Contra Jones v. State*, 33 N.Y.2d 275, 279, 307 N.E.2d 236, 237, 352 N.Y.S.2d 169, 171 (1973) (allegation of "intentional assault" states cause of action);

alternative, they require proof of "actual intent to injure," an equally stringent standard.<sup>228</sup> Very few courts have adopted the *Restatement of Torts*'<sup>229</sup> definition of intent,<sup>230</sup> and they have unanimously rejected actions based on wanton or reckless misconduct.<sup>231</sup> As a result, plaintiffs have successfully stated a cause of action only by alleging that the defendant-employer deliberately struck,<sup>232</sup> shot,<sup>233</sup> or poisoned<sup>234</sup> the plaintiff, or intentionally and fraudulently exposed the plaintiff to asbestos fibers<sup>235</sup> or toxic chemical fumes.<sup>236</sup>

*Finch v. Swingly*, 42 A.D.2d 1035, 1035, 348 N.Y.S.2d 266, 268 (1973) (plaintiff must allege "intentional or deliberate act" by defendant).

<sup>228</sup> *Gallegos v. Chastain*, 95 N.M. 551, 624 P.2d 60 (1981); *Schlenck v. Aerial Contractors, Inc.*, 268 N.W.2d 466, 471 (N.D. 1978).

<sup>229</sup> RESTATEMENT (SECOND) OF TORTS § 8A (1965).

<sup>230</sup> *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1229, 1233-34 (N.D. Ill. 1981); *Duncan v. Perry Packing Co.*, 162 Kan. 79, 86, 174 P.2d 78, 83 (1946); *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, 581 (1982) (concurring opinion); *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 739 (Tex. 1980) (action by worker's spouse for loss of consortium); *Bryan v. Utah Int'l*, 533 P.2d 892, 894-95 (Utah 1975).

<sup>231</sup> *Love v. Flour Mills of Am.*, 647 F.2d 1058, 1060 (10th Cir. 1981) (applying Oklahoma law); *Houston v. Bechtel Assocs. Prof. Corp.*, 522 F. Supp. 1094, 1097 (D.D.C. 1981) (construing Longshoremen's and Harbor Workers' Compensation Act); *Tysenn v. Johns-Manville Corp.*, 517 F. Supp. 1290, 1293 (E.D. Pa. 1981); *Ulichy v. National Dust Collector Corp.*, 391 F. Supp. 1265, 1268 (E.D. Pa. 1975); *Hagger v. Wortz Biscuit Co.*, 210 Ark. 318, 324, 196 S.W.2d 1, 4 (1946); *Duncan v. Perry Packing Co.*, 162 Kan. 79, 86, 174 P.2d 78, 83 (1946) (see dissenting opinion for argument that recklessness action should be allowed); *Great Western Sugar Co. v. District Ct.*, 610 P.2d 717, 720 (Mont. 1980); *Kennecott Copper Corp. v. Reyes*, 75 Nev. 212, 216, 337 P.2d 624, 626 (1959); *Santiago v. Brill Monfort Co.*, 10 N.Y.2d 718, 176 N.E.2d 835, 219 N.Y.S.2d 266 (1961); *Ross v. State*, 8 A.D.2d 902, 903, 187 N.Y.S.2d 13, 14-15 (1959); *Cooper v. Queen*, 586 S.W.2d 830, 833 (Tenn. Ct. App. 1979); *Kittell v. Vermont Weatherboard, Inc.*, 138 Vt. 439, 441, 417 A.2d 926, 927 (1980).

<sup>232</sup> *Barnes v. Chrysler Corp.*, 65 F. Supp. 806 (N.D. Ill. 1946); *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 220 S.W.2d 28 (1950); *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930); *Le Pochat v. Pendleton*, 187 Misc. 296, 63 N.Y.S.2d 313 (Sup. Ct. 1946), *aff'd*, 271 A.D. 964, 68 N.Y.S.2d 594 (1947); *Lavin v. Goldberg Bldg. Material Corp.*, 274 A.D. 690, 87 N.Y.S.2d 90, *appeal denied*, 275 A.D. 865, 89 N.Y.S.2d 523 (1949); *Garcia v. Gusmack Restaurant Corp.*, 150 N.Y.S.2d 232 (Sup. Ct. 1954); *Readinger v. Gottschall*, 201 Pa. Super. 134, 191 A.2d 694 (1963).

<sup>233</sup> *Jones v. State*, 33 N.Y.2d 275, 307 N.E.2d 236, 352 N.Y.S.2d 169 (1973).

<sup>234</sup> *De Coigne v. Ludlum Steel Co.*, 251 A.D. 662, 297 N.Y.S. 636 (1937).

<sup>235</sup> *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 378-81 (E.D. Pa. 1982); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1229 (N.D. Ill. 1981); *McDaniel v. Johns-Manville Sales Corp.*, 487 F. Supp. 714 (N.D. Ill. 1978).

<sup>236</sup> *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

The limited scope of these judicially created causes of action can best be understood by examining their development. Legislatures passed broadly worded exclusive remedy statutes,<sup>237</sup> and courts were faced with the unenviable task of circumventing these provisions on some principled basis. Consequently, judges articulated carefully circumscribed theories which allowed injured workers to institute tort proceedings outside the scope of the workers' compensation act.<sup>238</sup>

The first technique used to establish a judicial exception to the exclusive remedy clause was finding that the commission of an intentional tort severed the employment relationship.<sup>239</sup> Cases adopting this approach have permitted employees who were struck maliciously by their employers to recover damages in a battery action.<sup>240</sup> Courts utilizing this technique insist upon proof of deliberate intention on the theory that only specific intent to injure is sufficiently egregious to effectuate the fictional severance of the employment relationship.<sup>241</sup> The advantage of this method is that it gives the employee the option of 1) treating the relationship as still in existence and claiming workers' compensation benefits, or 2) considering the relationship as terminated and seeking common law tort remedies.<sup>242</sup> The disadvantage of this method is that it is purely fictional. The employment relationship may in fact continue long after the tort judgment has been finalized.

The most commonly used techniques for creating judicial exceptions focus on the language of the standard exclusive remedy clause.<sup>243</sup> The courts find either that the employee's injury was not "accidental"<sup>244</sup> or that it did not "arise out of the employment relationship."<sup>245</sup> Courts using the "accidental" approach<sup>246</sup> acknowledge that the term may en-

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<sup>237</sup> See note 98 *supra*.

<sup>238</sup> See generally 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.11 (1982).

<sup>239</sup> *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930).

<sup>240</sup> *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950).

<sup>241</sup> *Griffin v. George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979).

<sup>242</sup> *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930).

The election is not irrevocable. An injured worker may file a tort action and then decide to claim workers' compensation benefits instead. *E.g.*, *Owens v. Bill & Tony's Liquor Store*, 258 Ark. 887, 529 S.W.2d 354 (1975).

<sup>243</sup> See text accompanying notes 95-99 *supra*.

<sup>244</sup> *E.g.*, *Le Pochat v. Pendleton*, 187 Misc. 296, 63 N.Y.S.2d 313 (Sup. Ct. 1946), *aff'd*, 271 A.D. 964, 68 N.Y.S.2d 594 (1947).

<sup>245</sup> *E.g.*, *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, 576 (1982).

<sup>246</sup> *E.g.*, *Arrington v. Michigan-Wisconsin Pipe-Line Co.*, 632 F.2d 867 (10th Cir. 1980) (applying Oklahoma law); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp.

compass any injury that is "unexpected or unintended" from the employee's point of view,<sup>247</sup> thereby maximizing the scope of workers' compensation coverage. However, if the complaint alleges that the employer acted with deliberate intent to bring about the consequences of the act<sup>248</sup> or, in some jurisdictions, with constructive intent,<sup>249</sup> then the misconduct ceases to be accidental.<sup>250</sup> One court<sup>251</sup> described the policy justification for this approach in the following terms: "It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meagre allowance provided by the Workmen's Compensation Law."<sup>252</sup>

The other method of creating a judicial exception to the standard exclusive remedy clause is finding that the employer's misconduct did not arise out of the employment relationship. The employee is permitted to bring an intentional tort action on the theory that only "ordinary risks of employment" arise out of employment.<sup>253</sup> While negligent conduct is deemed to be an expected hazard, no reasonable individual would contemplate the risk of an intentional tort as a natural risk of employment.<sup>254</sup> Therefore, intentional misconduct does not "arise out of employment," and the plaintiff may pursue common law tort reme-

1229 (N.D. Ill. 1981); *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976); *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946); *Kennecott Copper Corp. v. Reyes*, 75 Nev. 212, 337 P.2d 624 (1959); *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982); *Readinger v. Gottschall*, 201 Pa. Super. 134, 191 A.2d 694 (1963); *Cooper v. Queen*, 586 S.W.2d 830 (Tenn. Ct. App. 1979).

<sup>247</sup> *Arrington v. Michigan-Wisconsin Pipe-Line Co.*, 632 F.2d 867 (10th Cir. 1980) (applying Oklahoma law); *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982). See also text accompanying notes 47-56 *supra*.

<sup>248</sup> *E.g.*, *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946).

<sup>249</sup> *E.g.*, *Finch v. Swingly*, 42 A.D.2d 1035, 348 N.Y.S.2d 266 (1973).

<sup>250</sup> *E.g.*, *De Coigne v. Ludlum Steel Co.*, 251 A.D. 662, 297 N.Y.S. 636 (1937); *Le Pochat v. Pendleton*, 187 Misc. 296, 63 N.Y.S.2d 313 (Sup. Ct. 1946), *aff'd*, 271 A.D. 964, 68 N.Y.S.2d 594 (1947).

<sup>251</sup> *Lavin v. Goldberg Bldg. Material Corp.*, 274 A.D. 690, 87 N.Y.S.2d 90 (1949), *appeal denied*, 275 A.D. 865, 89 N.Y.S.2d 523 (1949).

<sup>252</sup> *Id.* at 693-94, 87 N.Y.S.2d at 93-94.

<sup>253</sup> *E.g.*, *Busick v. Workmen's Comp. Appeals Bd.*, 7 Cal. 3d 967, 500 P.2d 1386, 104 Cal. Rptr. 42 (1972); *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982). See also *Barnes v. Chrysler Corp.*, 65 F. Supp. 806, 807 (N.D. Ill. 1946). For an excellent discussion of this theory, see *Duncan v. Perry Packing Co.*, 162 Kan. 79, 85-86, 174 P.2d 78, 87 (1946).

<sup>254</sup> *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, 576 (1982).



dies.<sup>255</sup> The problem with this technique is that it rests on the artificial assumption that only "ordinary" risks arise out of employment. Nevertheless, it encourages courts to think about policy considerations when determining which risks are covered by workers' compensation legislation. In addition, this approach can be used in jurisdictions that include occupational diseases within the scope of workers' compensation coverage by providing that benefits will be awarded for "any injury arising out of employment," and not just for "accidental injury."<sup>256</sup>

Courts have developed three different procedures to determine whether an injury is "accidental" or "arises out of the employment relationship." In some states, workers' compensation tribunals and the courts are deemed to have concurrent subject matter jurisdiction over an intentional tort action.<sup>257</sup> The employee is given an election between workers' compensation benefits and tort damages through the technique of estopping the defendant from objecting to the court's jurisdiction if the employee chooses to sue in tort.<sup>258</sup> The defendant is precluded from asserting that the intentionally inflicted injury was caused "accidentally" on the grounds that calling an intentional tort "accidental" is a fiction which was developed solely to make injured workers eligible for workers' compensation.<sup>259</sup> It would be a "travesty of justice" to permit the fiction to operate in favor of one whose act has been intentionally harmful.<sup>260</sup> Under the estoppel approach, as under the "severance of employment relationship" theory,<sup>261</sup> the worker is given a genuine election of remedies, and is thereby assured an opportunity to plead and prove punitive damages.

However, most jurisdictions that recognize alternative causes of action have not adopted the estoppel approach. Instead, they have treated workers' compensation benefits and tort damages as mutually exclusive and inconsistent remedies.<sup>262</sup> Workers' compensation tribunals have ju-

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<sup>255</sup> *Id.*

<sup>256</sup> For example, California's legislation provides that workers' compensation shall be the exclusive remedy for "any injury sustained by . . . [an employee] arising out of and in the course of the employment." CAL. LAB. CODE § 3600 (West Supp. 1983).

<sup>257</sup> *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930). See also *Williams v. Smith*, 222 Tenn. 284, 435 S.W.2d 808 (1968) (action against co-employee).

<sup>258</sup> *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930). At one time, the New York courts applied this estoppel technique. *E.g.*, *De Coigne v. Ludlum Steel Co.*, 251 A.D. 662, 297 N.Y.S. 636 (1937).

<sup>259</sup> *Williams v. Smith*, 222 Tenn. 284, 292, 435 S.W.2d 808, 811 (1968). See text accompanying notes 50-53 *supra*.

<sup>260</sup> *Williams v. Smith*, 222 Tenn. 284, 291, 435 S.W.2d 808, 811 (1968).

<sup>261</sup> See text accompanying notes 239-42 *infra*.

<sup>262</sup> *E.g.*, *Reep v. United States*, 557 F.2d 204 (9th Cir. 1977); *Harrington v. Moss*,

risdiction to award benefits for injuries that are accidental and arise out of employment, while courts may award tort damages in other cases. In some states, the workers' compensation tribunal is given exclusive or primary jurisdiction to determine jurisdiction.<sup>263</sup> If there are questions of fact (for example, about whether the injury was accidental) the workers' compensation tribunal must resolve them before a court can take jurisdiction over an intentional tort action.<sup>264</sup> In these jurisdictions, the workers' compensation board determines the availability of compensatory and punitive damages. In other states, the courts have concurrent jurisdiction with the workers' compensation board to determine subject matter jurisdiction.<sup>265</sup> In these jurisdictions, the first tribunal determines whether the employee may claim compensatory and punitive damages, and its judgment is *res judicata* in the other tribunal.<sup>266</sup> This approach gives the plaintiff a choice of forum, but does not ensure that the plaintiff has an opportunity to proceed in tort.

In summary, the primary problem with the judicially authorized alternative cause of action is finding a theory that both justifies its creation and provides a viable procedure for its implementation. The courts that have allowed an intentional tort action only when the injury is not "accidental" or does not "arise out of the employment relationship" have been sensitive to legislative intent, as expressed in the exclusive remedy statutes. However, these theories lead to the development of mutually exclusive remedies, which are cumbersome to administer. The fictional "severance of employment relationship" theory ignores the language of the exclusive remedy provisions, but permits a genuine choice of remedies comparable to that provided by the Arizona, Kentucky and Maryland statutes.<sup>267</sup> This evaluation suggests that legisla-

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407 A.2d 658 (D.C. Ct. App. 1979); *Scott v. Industrial Accident Comm'n*, 46 Cal. 2d 76, 293 P.2d 18 (1956); *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976); *Szydlowski v. General Motors Corp.*, 397 Mich. 356, 245 N.W.2d 26 (1976); *O'Rourke v. Long*, 41 N.Y.2d 219, 359 N.E.2d 1347, 391 N.Y.S.2d 553 (1976).

<sup>263</sup> *Harrington v. Moss*, 407 A.2d 658, 661 (D.C. Ct. App. 1979); *Szydlowski v. General Motors Corp.*, 397 Mich. 356, 245 N.W.2d 26 (1976). Similarly, in New Zealand, the Accident Compensation Corporation has exclusive jurisdiction to determine whether the plaintiff has suffered personal injury by accident. See notes 18 and 47 *supra*.

<sup>264</sup> *Reep v. United States*, 557 F.2d 204, 207 (9th Cir. 1977) (applying Federal Employees Compensation Act); *Szydlowski v. General Motors Corp.*, 397 Mich. 356, 245 N.W.2d 26 (1976); *Weber v. State*, 104 Misc. 2d 947, 429 N.Y.S.2d 380 (Ct. Cl. 1980).

<sup>265</sup> *Scott v. Industrial Accident Comm'n*, 46 Cal. 2d 76, 293 P.2d 18 (1956).

<sup>266</sup> *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

<sup>267</sup> See text accompanying note 192 *supra*.

tures would be well-advised to authorize alternative causes of action by statute in those jurisdictions that have already recognized them judicially, because legislators could establish clearly defined procedures that would maximize the punitive and deterrent impact of tort damages.

### C. *Legislative Options*

Various options for drafting pure no-fault legislation have emerged from this comparative study of the right to recover punitive damages for intentionally or recklessly inflicted injury in New Zealand and the United States. A legislature preparing to enact a pure no-fault statute must first decide whether, as a matter of policy, to preserve tort liability for punitive damages. This is of course an issue on which reasonable people may disagree. Although courts in New Zealand and the United States have performed amazing feats of statutory construction in order to retain punitive awards,<sup>268</sup> some commentators advocate the abrogation of punitive damages.<sup>269</sup> Assuming that the legislature decides to retain the punitive award to punish and deter egregious misconduct, there are two options for implementing its decision. One option would authorize the recovery of punitive damages alone as an independent, cumulative remedy. The other option would preserve tort liability for both compensatory and punitive damages by authorizing either cumulative or alternative tort actions for intentional or reckless acts.

#### 1. Punitive Damages as a Cumulative Remedy

The development of punitive damages as a cumulative remedy has been pioneered by New Zealand<sup>270</sup> and Texas.<sup>271</sup> The cumulative remedy option is attractive because it effectuates a sharp allocation of the functions traditionally performed by tort actions: no-fault benefits are awarded to compensate the injured person, and punitive damages are available to deter and punish the wrongdoer. This approach also places a definite ceiling on the wrongdoer's liability for compensatory dam-

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<sup>268</sup> See, e.g., text accompanying notes 40-78 *supra*.

<sup>269</sup> E.g., D. HIRSCH & J. POUROS, *THE CASE AGAINST PUNITIVE DAMAGES* (DRI Monograph 1969); Carsey, *The Case Against Punitive Damages: An Annotated Outline*, 11 FORUM 57 (1975); Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411 (1972). For a discussion of the arguments both for and against punitive damages, see J. GHIARDI & J. KIRCHER, note 129 *supra*, §§ 2.01-13; Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639 (1980); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931); Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303 (1980).

<sup>270</sup> See text accompanying notes 40-90 *supra*.

<sup>271</sup> See text accompanying notes 110-28 *supra*.

ages. However, because this option abrogates liability for compensatory damages, it ought to be adopted only if the no-fault plan provides adequate substitute benefits to the victims of intentional or reckless conduct. Otherwise, tort liability for compensatory damages should be preserved.

The cumulative remedy has important procedural advantages. It will reduce collateral litigation for two reasons. First, tort actions will be brought solely to deter or punish outrageous misconduct, not to obtain compensatory damages. Second, contribution actions between joint tortfeasors will be prohibited in most jurisdictions because tort liability will be imposed solely for punitive damages, which will be assessed separately against each individual wrongdoer. The other attractive feature of the cumulative remedy is that it does not necessitate the continuance of liability insurance. In fact, to maximize the punitive and deterrent impact of the cumulative remedy, it would be appropriate for the legislature to prohibit liability insurance coverage of punitive damages as a matter of public policy.

If the cumulative remedy approach is adopted, the legislature must explicitly exempt punitive damages from the provision that substitutes no-fault benefits for tort liability,<sup>272</sup> and the legislature should also specify the state of mind that will justify the imposition of punitive damages. At a minimum, liability ought to be imposed for intentional (including fraudulent) conduct. A jurisdiction wishing to maximize the punitive and deterrent impact of the cumulative remedy could also impose liability for recklessness (that is, the conscious disregard of the safety or rights of others). To eliminate the potential problems caused by the unavailability of compensatory damages, the legislature should specify that punitive damages may be recovered upon proof of nominal damages or upon proof that the plaintiff sustained actual harm covered by the no-fault plan. The legislature could also direct the courts to assess punitive damages commensurate with the nature of the defendant's conduct and the value of the defendant's assets, thereby changing the rule of some jurisdictions that punitive damages must be reasonably related to the amount of compensatory damages recovered.

## 2. Cumulative or Alternative Tort Actions for Punitive Damages

Not every jurisdiction will want to restrict the liability of an intentional or reckless wrongdoer to a punitive damages award, however. Legislatures in these states may prefer to recognize either a cumula-

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<sup>272</sup> See text accompanying notes 91 and 110 *supra*.

tive<sup>273</sup> or an alternative<sup>274</sup> tort action for compensatory as well as punitive damages. There are several advantages to a cumulative cause of action. First, it permits the injured person to obtain no-fault benefits, and then to sue for compensatory tort damages if the no-fault benefits do not adequately cover all the losses sustained. Second, it is easy to administer cumulative claims for no-fault benefits and tort damages because they are consistent and may be processed simultaneously. Last, the cumulative cause of action avoids line-drawing between the spheres of no-fault coverage and tort liability. The legislature need only decide whether to restrict cumulative liability to cases of deliberate intent,<sup>275</sup> or broaden liability to include intentional acts, or even recklessness.

Critics argue that the cumulative cause of action is too generous and conflicts with the no-fault objective of limiting a defendant's tort liability for compensatory damages. The alternative tort cause of action represents a more conservative approach, in which the defendant is subjected to tort liability only when no benefits have been awarded under the no-fault plan. A legislature that selects the alternative approach may either give the injured person a genuine choice between two mutually exclusive remedies,<sup>276</sup> or force an election by specifying in advance the circumstances under which each remedy will be available.<sup>277</sup> Giving the injured person a genuine choice is easier to administer, but conflicts with the no-fault objective of limiting a defendant's liability for compensatory damages.

Specifying the circumstances under which each remedy will be available in advance raises two problems. First, it must be determined who will draw the line between the mutually exclusive remedies. The no-fault tribunal may be given exclusive jurisdiction, or the courts may have concurrent jurisdiction to decide the issue of subject matter jurisdiction. Concurrent jurisdiction offers the plaintiff a choice of forum, which may enhance the likelihood that the court will acquire subject matter jurisdiction. Granting the no-fault tribunal exclusive jurisdiction, on the other hand, provides a more streamlined procedure.

The second problem posed by the forced election approach is defining the line between tort liability and no-fault coverage. The most commonly articulated distinction is that between accidental and nonaccidental injury. However, this distinction was originally developed to

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<sup>273</sup> See text accompanying notes 137-86 *supra*.

<sup>274</sup> See text accompanying notes 187-267 *supra*.

<sup>275</sup> See text accompanying note 139 *supra*.

<sup>276</sup> See text accompanying note 192 *supra*.

<sup>277</sup> See text accompanying note 213 *supra*.

distinguish between industrial accidents, which were covered by workers' compensation benefits, and occupational diseases, which were not. If the purpose of permitting alternative tort liability is to punish and deter egregious misconduct, it would be preferable to draw the line between tort liability and no-fault coverage with reference to the defendant's state of mind. Thus, tort liability could be imposed either for intentional acts<sup>278</sup> or for both intentional and reckless misconduct.

## II. MODIFIED NO-FAULT PLANS

### A. *United States: No-Fault Automobile Insurance*

The pure no-fault plans studied in the preceding section completely eliminate tort liability and substitute no-fault benefits. Modified no-fault plans represent a less drastic approach, affecting only tort liability for noneconomic loss.<sup>279</sup> Under the modified no-fault plans enacted by fifteen American jurisdictions,<sup>280</sup> victims of automobile accidents are paid no-fault benefits for their economic losses (including medical expenses and wage loss) up to a maximum amount, which ranges from \$2000 to over \$85,000.<sup>281</sup> In exchange, the victims give up their right to sue for noneconomic loss, such as pain and suffering,<sup>282</sup> unless they cross a "threshold" designed to prevent tort suits for noneconomic loss in the absence of serious injury.<sup>283</sup> *Dollar* thresholds establish an

<sup>278</sup> *Id.*

<sup>279</sup> See generally I. SCHERMER, note 7 *supra*, § 1.01.

<sup>280</sup> COLO. REV. STAT. §§ 10-4-701 to -723 (1973 & Supp. 1981); CONN. GEN. STAT. ANN. § 38-319 to -351a (West Supp. 1982); FLA. STAT. ANN. §§ 627.730-.741 (West 1972 & Supp. 1982) (repealed in October, 1982, for legislative revision); GA. CODE ANN. §§ 56-3401b to -3416b (1977 & Supp. 1982); HAWAII REV. STAT. §§ 294-1 to -41 (1976 & Supp. 1981); KAN. STAT. ANN. §§ 40-3101 to -3121 (1981); KY. REV. STAT. ANN. §§ 304.39-010 to -340 (Baldwin 1981); MASS. GEN. LAWS ANN. ch. 90, § 34A-34O (West 1969 & Supp. 1982), ch. 231, § 6D (Supp. 1982); MICH. STAT. ANN. §§ 24.13101-.13179 (Callaghan 1981); MINN. STAT. ANN. §§ 65B.41-.71 (West Supp. 1982); N.J. STAT. ANN. § 39.6A-1 to -20 (West 1973 & Supp. 1982); N.Y. INS. LAW §§ 670-678 (McKinney Supp. 1982); N.D. CENT. CODE 26-41-01 to -19 (1978 & Supp. 1981); PA. STAT. ANN. tit. 40, §§ 1009.101-.603 (Purdon Supp. 1982); UTAH CODE ANN. §§ 31-41-1 to -13.4 (1953 & Supp. 1981).

<sup>281</sup> For a table summarizing these statutes, see Note, *No-Fault Automobile Insurance: An Evaluative Survey*, 30 RUTGERS L. REV. 910, 926 (1977). If the plaintiff's economic losses are greater than the no-fault benefits, the plaintiff may recover the difference in a tort action.

<sup>282</sup> The statutory provisions abrogating tort liability for noneconomic loss are set forth in I. SCHERMER, note 7 *supra*, § 10.01.

<sup>283</sup> For a table summarizing the modified no-fault thresholds, see Note, *No-Fault*

amount of medical expenses (usually \$500 or \$1000) which is deemed to demonstrate that serious injury was sustained.<sup>284</sup> *Verbal* or *narrative* thresholds define serious injury by reference to physical effects, such as death, serious impairment of body function, or permanent serious disfigurement.<sup>285</sup>

This section examines whether modified no-fault plans have any impact on an automobile accident victim's right to recover punitive damages in tort. The answer depends on the language of the no-fault statute, and there is considerable diversity in the wording of the fifteen American no-fault plans.<sup>286</sup> Nevertheless, two basic issues can be identified. First, are punitive damages a noneconomic loss (as the term is defined by the no-fault statute), thereby requiring the plaintiff to prove serious injury in order to obtain a punitive award? Second, if punitive damages are a noneconomic loss, does the no-fault plan cover intentional tort and recklessness actions, or are they outside the scope of the act?

Cases from three states have considered these issues. In *Nales v. State Farm Mutual Automobile Insurance Co.*,<sup>287</sup> the plaintiff, who had been struck by a drunk driver, sought punitive damages despite the fact that he was unable to meet the narrative threshold specified in the Florida no-fault law.<sup>288</sup> The statute provided that the defendant was "exempted from tort liability for damages" unless the plaintiff met the threshold requirements for "damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury . . . arising out of the ownership, maintenance, operation or use of such motor vehicle."<sup>289</sup> The plaintiff argued that the statute made no reference whatsoever to liability for punitive damages.<sup>290</sup> The court agreed, and held that the no-fault law should be strictly construed against the defendant because it is a "statutory limitation on an injured party's common law right of action."<sup>291</sup>

The *Nales* court was then faced with the defendant's contention that punitive damages were not recoverable unless supported by an underly-

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*Automobile Insurance: An Evaluative Survey*, 30 RUTGERS L. REV. 910, 926 (1977).

<sup>284</sup> I. SCHERMER, note 7 *supra*, § 10.03.

<sup>285</sup> *Id.* §§ 10.02, 10.04.

<sup>286</sup> See statutes cited in note 280 *supra*.

<sup>287</sup> 398 So. 2d 455 (Fla. Dist. Ct. App. 1981).

<sup>288</sup> FLA. STAT. ANN. § 627.737(2) (West Supp. 1982) (repealed for revision).

<sup>289</sup> *Id.*

<sup>290</sup> *Nales v. State Farm Mut. Auto. Ins. Co.*, 398 So. 2d 455, 456 (Fla. Dist. Ct. App. 1981).

<sup>291</sup> *Id.*

ing award of compensatory damages.<sup>292</sup> Adhering to the approach adopted by the New Zealand judiciary,<sup>293</sup> the court ruled that punitive damages "need only bear some relationship to the fact of the injury . . . and the cause thereof."<sup>294</sup> Consequently, the plaintiff was permitted to claim punitive damages based upon proof of the actual harm which he had suffered, harm for which he could not obtain compensatory damages because of the no-fault law's immunity.<sup>295</sup>

In Georgia, a completely contrary result was reached in *Teasley v. Mathis*.<sup>296</sup> The plaintiff, who had been injured by a drunk driver, sought exemplary damages in a recklessness action, but was unable to meet the threshold requirement.<sup>297</sup> The court held that the action was barred by the no-fault statute,<sup>298</sup> which provides that, in an action for "bodily injury arising out of the operation" of a motor vehicle, "an insured person shall be exempt from liability to pay damages for noneconomic loss unless the injury is a serious injury," as defined by the threshold requirement.<sup>299</sup> The statute defines "noneconomic loss" as "pain, suffering, inconvenience and other nonpecuniary damage recoverable under the tort law of this State,"<sup>300</sup> and the Georgia Supreme Court ruled that exemplary damages are a "noneconomic loss."<sup>301</sup> Furthermore, it held the statute constitutional because "one of the purposes of the Act is to do away with collateral litigation in order to effect prompt payments."<sup>302</sup> Had the Georgia Supreme Court strictly construed the statutory limitations on common law rights of action,<sup>303</sup> it might have reached a different result. "Pain," "suffering," and "inconvenience" are various types of compensatory damages, and therefore the court could have ruled that "other nonpecuniary damage" refers exclusively to other items of compensatory damage, thereby exempting punitive damages from the threshold requirement.

Given the *Teasley* court's holding, however, it is important to ex-

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<sup>292</sup> *Id.* at 457. For a discussion of this issue in the context of pure no-fault legislation, see text accompanying notes 86-90, 122-28, and 129-30 *supra*.

<sup>293</sup> See text accompanying notes 86-90 *supra*.

<sup>294</sup> *Nales v. State Farm Mut. Auto. Ins. Co.*, 398 So. 2d 455, 457 (Fla. Dist. Ct. App. 1981).

<sup>295</sup> *Id.*

<sup>296</sup> 243 Ga. 561, 255 S.E.2d 57 (1979).

<sup>297</sup> GA. CODE ANN. §§ 56-3402b(13), 56-3410b (1982).

<sup>298</sup> *Teasley v. Mathis*, 243 Ga. 561, 564, 255 S.E.2d 57, 59 (1979).

<sup>299</sup> GA. CODE ANN. § 56-3410b (1982).

<sup>300</sup> GA. CODE ANN. § 56-3402b(1) (1982).

<sup>301</sup> *Teasley v. Mathis*, 243 Ga. 561, 563, 255 S.E.2d 57, 58 (1979).

<sup>302</sup> *Id.*

<sup>303</sup> See text accompanying note 291 *supra*.



amine Georgia's statutory definition of exemplary damages: "In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."<sup>304</sup> This is not a definition of punitive damages, as that term is normally used in the United States.<sup>305</sup> Rather, it is a definition of aggravated damages, as that term is defined in New Zealand.<sup>306</sup> Therefore, it was quite appropriate for the *Teasley* court to classify "exemplary damages" as a type of "nonpecuniary loss," since exemplary damages are primarily compensatory in nature. However, if this is a correct interpretation of the court's decision, the case will have a very limited impact outside Georgia because, in most jurisdictions, the primary function of punitive damages is not to compensate, but to punish.

In the third case, *Reimer v. Delisio*,<sup>307</sup> a Pennsylvania court "reluctantly"<sup>308</sup> denied punitive damages to a plaintiff who had brought a recklessness action against a speeding motorist. The Pennsylvania no-fault statute states: "Tort liability is abolished with respect to any injury that takes place in this State . . . if such injury arises out of the maintenance and use of a motor vehicle, except that . . . [an] individual remains liable for intentionally injuring . . . another individual."<sup>309</sup> The *Reimer* court ruled that recklessness is not included within the exemption for intentional torts.<sup>310</sup> The court then examined another exception in the statute, which preserves tort liability for noneconomic loss, provided the plaintiff meets the threshold requirements.<sup>311</sup> The plaintiff's injuries were sufficiently serious to cross the threshold, but nevertheless the court denied her claim for punitive damages<sup>312</sup> because the statute defines "noneconomic detriment" as "pain, suffering, inconvenience, physical impairment, and other nonpecuniary damage,"<sup>313</sup>

<sup>304</sup> GA. CODE ANN. § 105-2002 (Supp. 1982).

<sup>305</sup> See generally D. DOBBS, note 106 *supra*, § 3.9.

<sup>306</sup> See text accompanying notes 58-62 *supra*.

<sup>307</sup> 296 Pa. Super. 205, 442 A.2d 731 (1982).

<sup>308</sup> *Id.* at 209, 442 A.2d at 733.

<sup>309</sup> PA. STAT. ANN. tit. 40, § 1009.301(a)(3) (Purdon Supp. 1982).

<sup>310</sup> *Reimer v. Delisio*, 296 Pa. Super. 205, 215, 442 A.2d 731, 736 (1982).

<sup>311</sup> PA. STAT. ANN. tit. 40, § 1009.301(a) (5) (Purdon Supp. 1982).

<sup>312</sup> *Reimer v. Delisio*, 296 Pa. Super. 205, 217, 442 A.2d 731, 737 (1982). *Accord* *Teagle v. Hart*, 279 Pa. Super. 487, 421 A.2d 304 (1980). Pennsylvania courts permit the recovery of punitive damages under the no-fault statute when the plaintiff proves an intentional tort. *E.g.*, *Karpecik v. Houck*, 11 Pa. D. & C.3d 622 (C.P. Bucks County 1979).

<sup>313</sup> PA. STAT. ANN. tit. 40, § 1009.103 (Purdon Supp. 1982).

and then explicitly provides that "the term does not include punitive or exemplary damages."<sup>314</sup> The court concluded that the legislature must have intended to abolish recklessness liability for punitive damages altogether.<sup>315</sup>

The Pennsylvania no-fault law is perplexing until one examines its legislative history. The statute is based on the National No-Fault Motor Vehicle Insurance Act, which recommended the abolition of punitive damages in recklessness actions<sup>316</sup> because they are often insurable,<sup>317</sup> and insurance reduces the punitive and deterrent impact of punitive damages. The drafters of the National Act authorized the creation of a noninsurable "tort fine" to replace punitive damages in recklessness actions.<sup>318</sup> Pennsylvania's no-fault law preserves liability for "nonreimbursable tort fines."<sup>319</sup> However, Pennsylvania has not yet created a tort fine that can be imposed on reckless wrongdoers. To fulfill the intention of the drafters of the National Act, Pennsylvania should either revise its no-fault statute to permit the recovery of noninsurable punitive damages, or pass legislation creating a tort fine for reckless misconduct.

### B. Legislative Options

Modified no-fault legislation that preserves the punitive and deterrent functions of tort liability is needed. A legislature drafting a modified no-fault plan has three options. First, it can include all tort actions within the plan and establish a threshold requirement as a condition to

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<sup>314</sup> *Id.*

<sup>315</sup> *Reimer v. Delisio*, 296 Pa. Super. 205, 215, 442 A.2d 731, 736 (1982). *Contra Tcheou v. Weimer*, 13 Pa. D. & C.3d 243 (C.P. Dauphin County 1980).

<sup>316</sup> *Reimer v. Delisio*, 296 Pa. Super. 205, 212-15, 442 A.2d 731, 734-36 (1982).

<sup>317</sup> For a discussion of liability insurance coverage of punitive damages in recklessness actions arising out of automobile accidents, see J. GHIARDI & J. KIRCHER, note 129 *supra*, § 7.06. For a collection of cases authorizing punitive damages in automobile accident cases, see Annot., 65 A.L.R.3d 656 (1975); Annot., 62 A.L.R.2d 813 (1958).

<sup>318</sup> *Reimer v. Delisio*, 296 Pa. Super. 205, 212-16, 442 A.2d 731, 734-36 (1982).

<sup>319</sup> PA. STAT. ANN. tit 40, § 1009.301(b) (Purdon Supp. 1982). The statute provides:

Nothing in this section shall be construed to immunize an individual from liability to pay a fine on the basis of fault in any proceeding based upon any act or omission arising out of the maintenance or use of a motor vehicle: Provided, that such fine may not be paid or reimbursed by an insurer or other restoration obligor.

*Id.* The court in *Reimer* rejected the plaintiff's "valiant" argument that the term "tort fine" includes punitive and exemplary damages. *Reimer v. Delisio*, 296 Pa. Super. 205, 211-15, 442 A.2d 731, 734-36 (1982).

recovering punitive damages.<sup>320</sup> This option will substantially curb collateral litigation, and will confine the recovery of punitive damages to cases of serious injury. However, this approach is based on an assumption that punitive damages are warranted only when the plaintiff has been seriously harmed. In fact, punitive damages are awarded to punish and deter egregious misconduct, and there is no necessary correlation between the nature of the defendant's conduct and the seriousness of the plaintiff's injuries.

The second option available to the legislature is the recognition of punitive damages as an independent, cumulative remedy.<sup>321</sup> Under this approach, all tort actions are brought within the no-fault plan, but punitive damages are excluded. As a result, punitive damages may be recovered without satisfying the threshold requirement. The legislature should specify the state of mind that will justify the imposition of punitive damages. For automobile accidents, it may be desirable to impose punitive liability for recklessness<sup>322</sup> (particularly in cases of drunk driving)<sup>323</sup> as well as for the commission of intentional torts. Consideration should also be given to prohibiting liability insurance coverage of punitive damages.

The third option is to preserve tort liability for both compensatory and punitive damages in cases of intentional or reckless conduct.<sup>324</sup> Although it is possible to create a cumulative cause of action,<sup>325</sup> legisla-

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<sup>320</sup> See text accompanying notes 296-303 *supra*.

<sup>321</sup> See text accompanying notes 287-95 *supra*. Hawaii has explicitly recognized a cumulative punitive remedy in its no-fault legislation:

No provision of this section shall be construed to exonerate, or in any manner to limit the criminal or civil liability of any person who, in the maintenance, operation, or use of any motor vehicle:

(1) Intentionally causes injury or damage to a person or property; or

(3) Engages in conduct resulting in punitive or exemplary damages.

HAWAII REV. STAT. § 294-6 (Supp. 1982).

<sup>322</sup> See Annot., 62 A.L.R.2d 813 (1958). For a discussion of the type of recklessness that will subject defendants to liability for punitive damages, see text accompanying notes 150-59 *supra*. Drafters of no-fault legislation may wish to draw upon the proposed statutory tests for recovering punitive damages in products liability actions. S. 2631, 97th Cong., 2d Sess. § 13 (1982) (“‘[R]eckless disregard’ means conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice.”); MODEL UNIF. PROD. LIAB. ACT § 120, 44 Fed. Reg. 62714, 62748 (1979).

<sup>323</sup> See J. GHIARDI & J. KIRCHER, note 129 *supra*, § 5.03; Annot., 65 A.L.R.3d 656 (1975).

<sup>324</sup> See text accompanying note 309 *supra*.

<sup>325</sup> A cumulative intentional tort action would permit a plaintiff to sue in tort for any

tures in the United States have chosen instead to develop an alternative cause of action.<sup>326</sup> Under this approach, negligence actions come within the scope of no-fault legislation, and intentional tort or recklessness actions fall outside it. If this option is selected, it will be crucial to include a precise definition of the state of mind that removes the action from the scope of the no-fault act.<sup>327</sup>

### CONCLUSION

The basic philosophy behind the enactment of pure and modified no-fault plans is that the negligence lottery should be replaced with a system that compensates plaintiffs promptly and without proof of fault for their economic losses. The impetus for the adoption of no-fault legislation came from the failure of negligence law to compensate accident victims fairly and efficiently. However, in developing no-fault legislation, broad exclusive remedy provisions have been enacted which threaten to eliminate not only negligence liability, but tort liability for intentional and reckless conduct as well. It has been the thesis of this Article that no-fault legislation should be viewed as a substitute for compensatory damages only, and that tort liability for punitive damages should be preserved to punish and deter wrongdoers. Support for this proposition can be found in the case law construing no-fault legislation in both the United States and New Zealand. This Article has examined that body of case law and has suggested various options for drafting no-fault legislation that will both compensate accident victims and preserve the punitive and deterrent functions of tort law.

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economic or noneconomic loss for which the plaintiff had not received no-fault benefits.

<sup>326</sup> See text accompanying note 309 *supra*.

<sup>327</sup> For the text of the Uniform Motor Vehicle Accident Reparations Act and the intentional tort exclusionary provisions that have been enacted in the United States, see I. SCHERMER, note 7 *supra*, § 6.02. For a discussion of statutory definitions of recklessness, see note 322 *supra*.