INTRODUCTION

The advent of workers' compensation laws in this country signaled a fundamental change in American jurisprudence. For the first time, an employee was not forced to sue his employer at common law in order to be compensated for his injuries. Indeed, at first the "exclusive remedy" language of most state Workers' Compensation Acts (Act) barred an employee from pursuing a common law remedy against an employer who participated in the Act. However, despite this language, and with the passage of time, certain doctrinal exceptions to the exclusive remedy rule have evolved to expand an employer's liability for injury beyond the workers' compensation system. Currently, these exceptions include the dual capacity doctrine, suits against parent and sibling...
corporations of employers, third party suits against employers seeking indemnity and contribution, and the intentional tort exception.

In Ohio, the intentional tort exception to workers' compensation has achieved marked notoriety since the Supreme Court decided the seminal cases of Blankenship v. Cincinnati Milacron Chemicals and Jones v. VIP Develop-

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These cases outline under what circumstances an employee may sue an employer for an intentional tort in Ohio. In direct response to these decisions by the judiciary, the General Assembly enacted Senate Bill 307. This Bill will impact greatly on the existing rights of an employee to sue his employer for conduct which intentionally injures him. Consequently, this law affects the lives of many injured Ohio workers and is worthy of assiduous comment.

In Part I, this comment traces the evolution of workers' compensation laws in this country with particular emphasis on the development of the Act in Ohio. In Part II, the relevant caselaw is discussed, including Blankenship, Jones and their progeny which led to the enactment of Senate Bill 307. In Part III, Bill 307 is considered along with its implications for the injured worker.

I. WORKERS' COMPENSATION: THE FORMATIVE YEARS

Historically, the workplace was governed by the law of master and servant. Under that body of law, an injured employee had to resort to the courts to receive compensation for his physical or economic loss. At common law, the courts were generally unsympathetic to employees because awarding damages to an injured employee inhibited industrial development. In order to recover, an employee was required to make two showings. The first showing was that the employer had assumed a duty of care towards him. Secondly, because at common law negligence was considered the proper basis of liability, the employee had to show the employer was negligent.

\[^{15}\text{Ohio St. 3d 90, 472 N.E.2d 1046 (1984).}\]
\[^{16}\text{Amended Substitute Senate Bill 307 was signed by Governor Richard Celeste on May 23, 1986 and became effective on August 22, 1986. The Bill passed the House on May 16, 1986 and the Senate on May 17, 1986 by substantial majorities. WORKERS' COMPENSATION JOURNAL OF OHIO, May-June (1986), Vol. 1 at 1.}\]
\[^{10}\text{This comment will focus primarily on § 4121.80 because the length of the bill prevents comprehensive analysis.}\]
\[^{12}\text{See Comment, Election and Co-employee Immunity Under Alabama's Workers' Compensation Act, 31 ALA. L. REV. 2, 3-4 (1979) [hereinafter cited as Election and Immunity] (common law courts unreceptive to injured workers); W. DODD, ADMINISTRATION OF WORKERS' COMPENSATION, 26 (1936) (to encourage industrial expansion, judges made employer's burdens as light as possible); Brodie, The Adequacy of Workmen's Compensation As Social Insurance: A Review of Developments and Proposals, 1963 Wis. L. REV. 57 (Courts probably prioritized needs of industrial system over needs of injured workers).}\]
\[^{13}\text{Bohyer, supra note 3, at 157. (workers' compensation removed requirement of employer's fault). According to Prosser, employers were limited to minimum responsibilities and even as to these obligations the employer was not an insurer of safety. Consequently, the employer was liable only for failing to exercise reasonable care. D. PROSSER & W. KEETON, supra note 11, § 80 at 568-69.}\]
\[^{14}\text{The specific duties of an employer included (1) providing and maintaining a reasonably safe place to work and safe appliances, tools and equipment; (2) providing a sufficient number of suitable and competent fellow employees to permit safe performance of work; (3) to warn employees of unusual hazards; and (4) to establish and enforce proper safety rules. H. BLANCHARD, LIABILITY AND COMPENSATION INSURANCE (1917) at 43-44 cited in Ashford & Johnson, Negligence vs. No Fault Liability: An Analysis of the Workers' Compensation Example, 12 SETON HALL 725, 729 n. 15 (1982). See also REUSCHLEIN & GREGORY, supra note 11, at 209 § 144 (discussing master's duty as to place of work).}\]
Three common law defenses evolved for the employer: (1) contributory negligence;\textsuperscript{15} (2) assumption of the risk;\textsuperscript{16} and (3) the fellow servant rule.\textsuperscript{17} These defenses, usually called the unholy trinity,\textsuperscript{18} insulated an employer from legal liability even though he failed in his duty as master to protect his servants.\textsuperscript{19} Consequently, injured workers often became public charges in a pre-welfare society.\textsuperscript{20} Thus, it was the predicament of the uncompensated worker\textsuperscript{21} which became a catalyst in the formulation and enactment of workers’ compensation laws.\textsuperscript{22}
The evolution of workers' compensation laws, effected a historical quid pro quo. For the first time, an injured worker was nearly guaranteed benefits regardless of any fault of his or of his employer. In exchange, the worker relinquished his right to pursue a potentially larger recovery in a common law action. This included foregoing any right to recover for pain and suffering, loss of consortium, punitive damages or damages for disfigurement. To this end, when a worker received compensation under the Act it was considered his exclusive, albeit reduced, remedy. In return, employers gave up their common law defenses in exchange for limited liability for any work-related

39The right to receive benefits under the workers' compensation system is contingent upon a worker's ability to show: (1) The "injury"; (2) "arose out of and in the course of employment." OHIO REV. CODE ANN. § 4123.74 (Anderson 1980). See also Malone v. Industrial Comm., 140 Ohio St. 292, 43 N.E.2d 266 (1942) overruled, Village v. General Motors Corp., 15 Ohio St. 3d 129, 472 N.E.2d 1079 (1984). ("injury" for purposes of workers' compensation comprehends a physical or traumatic damage or harm, accidental in character and not in the usual course of events); Welsh v. Industrial Comm., 136 Ohio St. 387, 26 N.E.2d 198 (1940) (Workers' compensation is for injured employees if injuries occur in the course of and arise out of employment); Industrial Comm. v. Ahern, 119 Ohio St. 41, 162 N.E. 272 (1928) ("in the course of employment" connotes injury sustained in the performance of some required duty done directly or incidentally in the service of the employer).

The term "arising out of" requires showing a causal connection between the employment and injury. See Bralley v. Daugherty, 61 Ohio St. 2d 302, 401 N.E.2d 448 (1980). The additional requirement that an injury arise out of employment has been labeled the "increased-risk" test. Illinois Workers, supra note 3, at 612, n. 35.

For the statutory requirements of other state's workers' compensation acts, See California's Exception, supra note 3, at 170 n. 26 (discussing Kansas Law); Henry, supra note 5, at 586-89 (discussing Idaho Act); Election and Immunity, supra note 12, at 2 (discussing Alabama Act).

24"A determination of work relatedness, not the degree of fault of the employer or employee, is critical to a claim for workmen's compensation." LARSON, supra note 1, at § 2.10 (1984). See also J. YOUNG, supra note 15, at § 1.12.

25"Pain and suffering" is a term used to describe not only physical discomfort but also mental and emotional trauma which are recoverable as elements of damage in tort. BLACK'S LAW DICTIONARY. 999 (5th ed. 1979).

26"Loss of consortium" is defined as loss-of society, affection, assistance and conjugal fellowship, and includes loss or impairment of sexual relations. Id. at 280. Loss of consortium includes damages for loss of sexual attention, society and affection, as well as for medical expenses made on behalf of the spouse. D. PROSSER & W. KEETON, supra note 11, § 125 at 931.

27"Punitive damages" are "[D]amages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant. . . ." BLACK'S, supra note 26, at 352. See also D. PROSSER & W. KEETON, supra note 11, § 2 at 9; Note, Blankenship v. Cincinnati Milacron Chemicals, Inc.: Some Fairness For Ohio Workers and Some Uncertainty For Ohio Employers, 15 U. Tol. L. Rev. 403, 407 (1983) (discusses common law actions against employers).

28Facial disfigurement is not necessarily covered if it does not bar a worker from obtaining and keeping employment. LARSON, supra note 1, § 2.40 at 10-11. Nine states make no provision for disfigurement benefits and 28 others limit such benefits explicitly or implicitly to injuries that affect employability. Remedy Requirement, supra note 4, at 1643 n. 12.


30For a discussion of an employer's common law defenses to liability, see supra notes 15-17, and accompanying text.
In Ohio, the first workers' compensation system was established in 1911, after the General Assembly created a five member bipartisan committee to study the feasibility of a "direct compensation law or law affecting the liability of employers to employees for industrial accidents." However, the compensation system, as enacted in 1911, was not a talismanic solution to the problems of employees because it did not provide for compulsory employer participation. To remedy this situation, an amendment to article II, Section 35, of the Ohio Constitution was adopted by the electorate on September 12, 1912 and has become the foundation of all subsequent workers' compensation laws. This amendment empowered the General Assembly to provide compensation for injuries or occupational diseases occurring in the course of a workman's employment, and to establish compulsory contribution by employers with five or more employees into a state fund to pay such awards.

However, prior to 1924, section 35 of Article II did not wholly eradicate an injured employee's right to sue an employer under common law. In its

31Note, Torts-Intentional Torts in the Workplace — Further Erosions of the Workers' Compensation Act Exclusive Remedy Bar to Tort Actions, 10 N. Ky. L.R. 356 (1982) [hereinafter cited as Torts in the Workplace]. See also Ashford, supra note 13 at 725 n. 1 (employer trades potentially open ended liability for limited liability).

321911 OHIO LAWS 524. The headnote of Senate Bill 127 provided the Act is "To create a state insurance fund for the benefit of the injured, and the dependents of killed employees, and to provide for the administration of such fund by a state liability board of awards." Id. The constitutionality of the 1911 Act was upheld by the Ohio Supreme Court. In State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N.E. 602 (1912).

331910 OHIO LAWS 231. For a summary of the committee findings which prompted the Ohio Act, see Comment, Workers' Compensation in Ohio: Scope of Employment and the Intentional Tort, 17 AKRON L. REV. 249, 251-52 (1983) [hereinafter cited as Workers Compensation].

34If an employer chose not to participate, the Act provided he was liable to his employees for damages sustained in the course of employment by reason of a wrongful act and he was not able to assert the traditional common law defenses to bar recovery. J. YOUNG, supra note 15, § 1.10 at 8. If the employer elected to participate, the employees were charged with furnishing ten percent of the employer's premium. Id. at 9.

35OHIO CONST. art. II § 35. See infra, note 47, for the language amending the Constitution in 1924.

36Holmes, supra note 14, at 1. See also Schrader v. Cincinnati Bell, 56 Ohio App. 501, 11 N.E.2d 253 (1936) (Article II § 35 is legislative superstructure for workers' compensation).

37The term "injury" is defined as "any injury whether caused by external accidental means or accidental in character and result, received in the course of and arising out of, the injured employee's employment." OHIO REV. CODE ANN. § 4123.01(c) (Anderson 1986). Compensable injuries are listed at Id., § 4123.68.

38Id. § 4123.68 provides a schedule of compensable occupational diseases. Prior to August 22, 1986, for diseases not listed, an employee had to show the existence of the following criteria in order to be compensated: (1) the disease is contracted in the course of employment; (2) the disease is peculiar to the claimant's employment by its causes and the characteristics of its manifestations or the conditions of the employment result in a hazard which distinguishes the employment in character from employment generally; and (3) the employment creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally. State ex rel. Ohio Bell Telephone Co. v. Krise, 42 Ohio St. 2d 247, 327 N.E.2d 756 (1975) interpreting OHIO REV. CODE ANN. § 4123.68(BB).

39Massachusetts is the only state which provided compensation for occupational diseases in its original Workers' Compensation legislation. Leibman and Dworkin, supra note 1, at 941 n. 2.

40In 1977 "Workmen's Compensation" was changed to "Workers' Compensation." 1976 LAWS OF OHIO 545.

41In 1924, the Act was amended to provide for mandatory participation for employers employing three or more persons. 1923 LAWS OF OHIO 224.
original form, that section of Article II provided: "No right of action shall be taken away from an employee when the injury, disease, or death arises from the failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of the employees." In addition, section 1465-76 of the Ohio General Code, permitted an injured employee to pursue common law damages when he was injured by the employer's "willful act." However, a definition of the term, "willful act," was not present in the statute. Consequently, judicial interpretation of the term resulted in injured employees recovering for their employers gross negligence. A 1914 amendment to section 1465-76 was eventually enacted and defined a willful act as one "done knowingly and purposely, with the direct object of injuring another." Thereafter, the Supreme Court emphasized that an employee could only come under the safe harbor of 1465-76 if his employer's act displayed a conscious intent to inflict injury upon another.

Subsequently, in 1924, the Ohio Constitution was once again amended to excise the "lawful requirement" exception from the Act in order to halt an employer's "open liability." Further, in 1931, the willful act exception to the Act, embodied in Code Section 1465-76, was expressly repealed and replaced by contemporary Revised Code Section 4123.74. In pertinent part, section

Ohio Const. art. II § 35. See also Ohio Automatic Sprinklers Co. v. Fender, 108 Ohio St. 149, 141 N.E. 269 (1923) (defining "lawful requirement" for purposes of the Act as including statutes, ordinances, lawful orders of duly authorized officers, specific and definite requirements constituted by law, and laws embodying in general terms duties and obligations of care and caution; and further includes requirements relating to safety of the place of employment and to the furnishing and use of devices, safeguards, methods, and processes designed for the reasonable protection of the life, health, safety, and welfare of employees).


See e.g., Conrad v. Youghiogheny & Ohio Coal Co., 107 Ohio St. 387, 140 N.E. 482 (1923) (wrongful death); Kuhn v. Cincinnati Traction Co., 109 Ohio St. 263, 142 N.E. 370 (1924) (negligent maintenance of an elevator); State ex rel. Wolf Run Coal Co. v. Industrial Comm., 110 Ohio St. 487, 144 N.E. 272 (1924) (failure to observe Mine Act).

1914 LAWS OF OHIO 194. Gildersleeve, 109 Ohio St. at 348, 142 N.E. at 680.

1923 LAWS OF OHIO 631, 632. The 1924 Amendment added the following emphasized language to Article II § 35:

Such compensation shall be in lieu of all other rights to compensation or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

In State ex rel. Engle v. Industrial Comm., 142 Ohio St. 425, 52 N.E.2d 743 (1944), the Ohio Supreme Court interpreted the 1924 Amendment to mean:

[After the effective date of the amendment, regardless of how the injury occurred, the rights of the workmen... were determined by the Industrial Commission under the Compensation Act. Thereafter, the courts are without jurisdiction to entertain an action for damages, for death, personal injury, or occupational disease brought by or on behalf of a workman against his complying employer...]

1931 LAWS OF OHIO 39. Although not expressly repealed by the legislature until 1931, the judiciary considered G.C. § 1465-76 implicitly repealed by the 1924 Amendment. See Mobley & Carew Co. v. Lee, 129 Ohio St. 69, 193 N.E. 745 (1934) cited by Holmes, supra note 14, at 10.

*Torts in the Workplace, supra note 31, at 367.
4123.74 provides:

[E]mployers who comply with Section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition received or contracted by an employee in the course of or arising out of his employment . . . 50

II. ON THE ROAD TO BLANKENSHIP AND ITS PROGENY

As a result of the changes in the Ohio Constitution and the statutory law implementing it, the Act was concluded to be the exclusive remedy of an injured worker. In providing employers with the broadest possible immunity, the exclusive provisions of the workers’ compensation system were strictly upheld despite callous results. For example, in Zajachuck v. Willard Storage Battery Company, 51 an employee suffered lead poisoning after his employer violated a specific safety requirement. 52 The court held the employee was precluded from recovering common law damages because of the exclusive provisions of the Act. The employee was also unable to collect workers’ compensation because occupational diseases were not compensable as an injury for purposes of the Act until 1939. 53

In an attempt to ameliorate the exacting results of cases such as Zajachuck, the court in Triff v. National Bronze & Aluminum Foundry 54 held an employee has a common law right of action against his employer for an occupational disease caused by the employer’s negligence. 55 Although Article II, Section 35 of the Ohio Constitution empowered the legislature to provide for occupational diseases under the Act, the legislature had thus far failed to do so. Essentially, the court reinstated an employee’s right to sue for injuries sustained outside the scope of the Act.

The court’s decision in Triff quickly spawned an amendment to the existing law which brought occupational diseases within the parameters of the Act and provided employers with prospective immunity from all injury or disease received in the workplace. 56 Thus, the Triff exception to an employer’s

50Ohio REV. CODE ANN. § 4123.74 (Anderson 1986).
51106 Ohio St. 538, 140 N.E. 405 (1922).
52Id.
53Id. at 542, 140 N.E. at 406-07. See also Mobley and Carew Co. v. Lee, 129 Ohio St. 69, 193 N.E. 745 (1939) (Employee denied common law remedy for nervous breakdown caused by employer and compensation under Act unavailable).
54135 Ohio St. 191, 20 N.E.2d 232 (1939). In Triff an employee died after contracting silicosis. The spouse of the decedent sought to recover for wrongful death resulting from the disease. Id.
55Id. at 193, 20 N.E.2d at 238-39.
561939 LAWS OF OHIO 422. Within sixty days of the Triff decision a bill was introduced into the Legislature to amend G.C. 1465-70 (R.C. 4123.70). WORKERS’ COMPENSATION, REFERENCE MANUAL FOR LEGAL EDUCATION PROGRAM, § 3 at 1.15.

The amendment was a negotiated compromise between employers, represented by the Ohio Manufacturer’s Association, and employees, represented by the American Federation of Labor. The most significant
immunity for negligently causing a worker to suffer an occupational disease was short-lived.

The cases arising after the resurgence of the exclusive remedy rule, like the cases arising before it, provided little justice to an injured employee. In *Bevis v. Armco Steel Corporation*, an employee contracted silicosis in the course of his employment. Medical examinations and chest X-rays provided by the employer indicated signs of the disease, however the employer falsely told the employee otherwise. Subsequently, the employee discovered the disease, filed for workers' compensation and sued his employer for aggravating his injury.

After examining section 35 of the Ohio Constitution and noting the repeal of G.C. 1465-76 in 1931, the court of appeals affirmed the dismissal of the plaintiff's suit. In so holding, the court stated that an employer's "open liability" had been abolished and where an affliction occurs in or arises out of the employment, no matter how it occurs, worker's compensation provides an exclusive remedy, even if the condition is not compensable under the Act. Thus, because the initial disease was compensable under the Act, the court refused to allow a common law action for damages against the employer whose deceit and misrepresentation aggravated the disease.

In a second case, *Greenwalt v. Goodyear Tire and Rubber Company*, an employer promised to process an employee's workers' compensation claim. Instead, the employer sent the employee weekly checks in the same amount as what he would have received as workers compensation benefits. After two years, the employer ceased all payments and revealed to the totally disabled worker that his claim for compensation had never been filed. The Ohio Supreme Court denied the worker's suit based on the exclusive provision of the

concession granted to employees was the statutory inclusion of occupational diseases within the coverage of workers' compensation. Note, *Workers' Compensation and the Intentional Tort a New Direction for Ohio*, 12 CAP. U.L. REV. 287, 291 nn. 20-21 (1982) [hereinafter cited as A New Direction].

*Bevis*, 86 Ohio App. 525, 526, 93 N.E.2d 33, 34 (1949), appeal dismissed per curiam, 153 Ohio St. 366, 91 N.E.2d 479 (1950), cert. denied, 340 U.S. 810 (1950). Subsequently, plaintiff's wife sued for loss of consortium. Bevis v. Armco Steel Corp. 156 Ohio St. 295, 102 N.E.2d 444 (1951). In this case the court stated an employee has no greater rights if a cause of action is based on an employer's intentional or malicious misconduct than if a cause of action is based on negligence. *Bevis*, 156 Ohio St. at 301, 102 N.E.2d at 446-47.

Silicosis is a form of pneumoconiosis (inflammation of the lungs) due to the inhalation of dust containing silica in the course of several years occupational exposure. *Stedman's Medical Dictionary*, 1290 (5th ed. 1982).

*Bevis*, 86 Ohio App. at 526, 93 N.E.2d at 34.

*Id.* at 533, 93 N.E.2d at 37.

*Id.* at 534, 93 N.E.2d at 37 (Ross, P.J., concurring). If plaintiff had been allowed to prevail it would have been tantamount to "double satisfaction." *Id.* at 535, 93 N.E.2d at 37.

164 Ohio St. 1, 128 N.E.2d 116 (1955).

*Id.* at 2, 128 N.E.2d at 117-18.

*Id.* at 3, 128 N.E.2d at 118.

*Id.* In 1955, the statute of limitations on workers' compensation claims was two years. Consequently, the employer's revelation came after the time for filing a claim had expired. *Id.*
Act, and the fact that the employer had no legal duty to file the claim. In reaching this conclusion, the court found the analysis in Bevis persuasive.

In dissent, Justice Zimmerman indicated that an employee is not precluded from seeking common law damages where the negligence or misconduct of his employer is outside the scope of the workers' compensation act. Despite this prophetic language, it was over twenty years before his words reached fruition.

In Delamotte v. Unicast Division of Midland Ross Corp., the Lucas County Court of Appeals held that a common law action for an intentional tort was not barred by the Workers' Compensation Act. In Delamotte, an employee brought suit against his employer declaring the employer "fraudulently, maliciously and willfully" conspired not to inform him that he had contracted silicosis. In finding for the employee, the court relied on the 1959 amendment to Code Section 4123.74 which added the following language to the statute: "received or contracted by an employee in the course of or arising out of his employment." The Delamotte court stated this language reduced the categories of injuries for which an employer is civilly immune to those arising out of or received in the course of employment. Thus, the court utilized the language of the amendment to infer a legislative intent to prevent further unjust decisions, and to allow an injured employee to resort to a civil remedy when intentionally injured by his employer.

In light of Greenwalt, Bevis and the amendments of 1939 and 1959 to the Act, the Delamotte decision should not be alarming. Arguably, the decision was the product of a closely-knit alliance between the judiciary and legislature which attempted to fully compensate an employee who was the victim of an employer's intentional tort. The alliance was, however, short-lived as the fabric forming it began to unravel when eight former and current employees sued a Cincinnati Chemical Company. That case, which became known simply as

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64 Id. at 7-8, 128 N.E.2d at 120-21.
67 Id. at 7, 128 N.E.2d at 120.
68 Id. at 8, 128 N.E.2d at 121.
69 Id. at 9, 128 N.E.2d at 121 (Zimmerman, J., Dissenting). Justice Steward concurred in the court's syllabus but dissented from the judgment. Justice Hart also dissented. Id. at 8, 128 N.E.2d at 121.
70 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978).
71 Id.
72 Id. at 160, 411 N.E.2d at 815.
73 Id. at 161, 411 N.E.2d at 816. The court stated: "We predicate our judgment and this result upon a thorough analysis of R.C. 4123.74, as amended in 1959 . . . ."
74 1959 LAWS OF OHIO 1334.
75 OHIO REV. CODE ANN. § 4123.74 (Anderson 1986).
76 Delamotte, 64 Ohio App. at 161, 411 N.E.2d at 816.
77 Id. at 163-64, 411 N.E.2d at 816.
In **Blankenship**, the plaintiffs sued the employer for knowingly exposing them to noxious chemicals during the course of their employment, which caused sickness, pain and suffering and ultimately rendered the plaintiffs totally disabled. The plaintiffs charged further that the employer knew of the dangerous conditions but failed to report it to the appropriate state or federal agencies and further failed to provide medical examinations as mandated by law. These acts and omissions were alleged to be intentional, malicious, and in willful and wanton disregard of the employer’s duty to protect the health of his employees.

The Supreme Court sustained the allegations in reversing the lower courts, and held that an employee is precluded by neither the State Constitution nor the Workers’ Compensation Act from seeking a common law remedy against his employer for an intentional tort. In arriving at its decision, the court found it significant that the Code, in section 4124.74, limits the scope of an employer’s civil immunity under the Act to only those injuries received in the course of or arising out of employment. The court then reasoned that by limiting the scope of immunity, the General Assembly intended to preserve certain remedies for workers whose injuries are not compensable under the Act.

The **Blankenship** court then expressly agreed with the **Delamotte** court that an intentional tort is not an injury received in the scope or course of employment. The **Blankenship** court reasoned that workers do not contemplate an employer’s intentional tort as a natural risk of employment.

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78Blankenship v. Cincinnati Milacron Chemicals Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982), cert. de
 nied. 459 U.S. 857 (1982). The spouses of the employees also sued the employer for lost consortium, however, these claims were not raised on appeal. Further, the chemical manufacturer and distributor were not parties to the appeal, although the complaint made them named defendants. Id., 433 N.E.2d at 573, nn. 1-5.

79**Delamotte** was decided December 15, 1978. 64 Ohio App. 2d 159, 411 N.E.2d 814. **Blankenship** was filed on February 22, 1979. 69 Ohio St. 2d at 608, 433 N.E.2d at 572.

80**Blankenship**, 69 Ohio St. 2d at 608, 433 N.E.2d at 572.

81Id. at 608-09, 433 N.E.2d at 574. Section 11(c)(1) of the Occupational Health and Safety Act mandates that each employer: “[S]hall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1) (1982).

82**Blankenship**, 69 Ohio St. 2d at 609, 433 N.E.2d at 574.

83The majority opinion was written by Justice W. Brown and was concurred in by Celebrezze, C.J., Sweeney and C. Brown J.J. Chief Justice Celebrezze authored a concurring opinion which Sweeney and C. Brown, J.J. concurred in. Justice C. Brown wrote a concurring opinion which was concurred in by Celebrezze, C.J. and Sweeney, J. Justice Locher concurred in the holding and dissented. Holmes and Krupansky, J.J., dissented. Thus, only 5 Justices agreed that a common law action would lie against an employer who commits an intentional tort. See **Torts in the Workplace**, supra note 31, at 364 n. 49.

84**Blankenship**, 69 Ohio St. 2d at 608, 433 N.E.2d at 572.

85Id. at 612, 433 N.E.2d at 575.

86Id.

87Id., 433 N.E.2d at 576.
Therefore an employer is not immune from an employee’s civil suit for damages. Thus, the reasoning of the majority can be reduced to a syllogism: employers receive civil immunity for injuries arising out of the scope of employment; intentional torts to not arise out of the scope of employment; therefore, participation in workers’ compensation does not immunize an employer from their intentional torts.

Soon after Blankenship was decided, questions began to arise as to the scope of the opinion itself. One central question revolved around the definition of an intentional tort. The majority failed to address this issue and the justices outside the majority were in disagreement over whether the facts alleged were tantamount to an intentional tort. The complaint itself in Blankenship was of little value in supplying an answer due to its multiple allegations that the employer’s acts and omissions were willful, wanton, malicious and intentional.

Other questions arising after Blankenship revolved around the issues of election of remedies and award of damages. The majority opinion did not state whether an employee would be forced to elect to receive workers’ compensation or sue for damages. A common thread running through previous court decisions would suggest anything short of an election of remedies would constitute double compensation.

Moreover, language in the majority opinion did not serve to clarify the issue. In writing for the majority, Justice William Brown noted that damages such as pain and suffering, loss of consortium, and punitive damages are unavailable to an injured worker under workers’ compensation. He continued, however, by stating these damages are available to an employee injured by his employer’s intentional tort. Arguably, this language could be read in support of either position: that an election of remedies was required or that an employee was not precluded from seeking damages even after receiving workers’ compensation.

Cognizant of the debate, the Supreme Court granted certiorari to Jones v. VIP Development Co. in order to further elucidate its holding in Blankenship. On appeal, the principal case of Jones was consolidated with two other cases: Gains v. City of Painesville and Hamlin v. Snow Products.
In *Jones*, employees were laying conduit when the boom of the hydraulic crane they were using came into contact with high voltage electric lines. The employees were severely injured and subsequently filed for workers' compensation. Additionally, the employees filed suit against the employer alleging the company knew or should have known of dangerous conditions which should have been made safe and, accordingly, the employer should have warned the employee.

In *Gains*, a coal chute operator was fatally injured when he reached into the chute to clear debris. Prior to the accident, the employer had removed a metal safety cover from the chute. In her complaint, the surviving spouse characterized the employer's conduct in removing the cover as intentional, malicious, willful and wanton.

In *Hamlin*, employees alleged they were exposed to toxic chemicals at work, they consequently received serious physical injuries, and the employer knew of the hazardous workplace conditions but misrepresented the safety of the workplace. These employer’s actions were characterized as malicious, willful and reckless.

In *Jones*, a majority of the Ohio Supreme Court found the complaint stated a cause of action, reversed the trial court's summary judgment, and remanded the case to determine if the alleged conduct constituted an intentional tort. In *Gains*, the court reinstated a jury verdict for plaintiff but remanded the case for a determination of damages. In *Hamlin*, the Court similarly reinstated a jury verdict for the plaintiff in the amount of $48,000.

In arriving at its decision, the *Jones* court essentially resolved the questions which remained unanswered after *Blankenship*. The court defined an intentional tort as "an act committed with the intent to injure another or committed with the belief that such injury is substantially certain to occur." The court expressly rejected the argument that a specific intent to injure is always a necessary element of an intentional tort. Rather, such intent is unnecessary where one proceeds to act in spite of a perceived threat of harm which is

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95 *Jones*, 15 Ohio St. 3d at 90, 472 N.E.2d at 1048.
96 *Id.* at 95, 472 N.E.2d at 1051.
97 *Id.* at 91, 472 N.E.2d at 1048.
98 *Id.* at 97, 472 N.E.2d at 1052.
99 *Id.* at 92, 472 N.E.2d at 1049.
100 *Id.*, 472 N.E.2d at 1053.
101 *Id.* at 95, 472 N.E.2d at 1051.
102 *Id.* at 96-97, 472 N.E.2d at 1052.
103 *Id.* at 97-98, 472 N.E.2d at 1053. The jury originally returned a verdict in favor of the plaintiffs in the amount of $43,000 compensatory damages and $5,000 punitive damages. The court reduced the award by $19,500, which represented the amount two defendants paid in exchange for plaintiffs' covenant not to sue. *Id.* at 92, 472 N.E.2d at 1049.
104 *Id.* at 95, 472 N.E.2d at 1051 citing *Restatement (Second) of Torts* § 8A at 15 (1965).
substantially certain to occur.\textsuperscript{105}

The court next considered whether an intentionally injured worker is precluded from seeking common law damages against an employer if he received workers' compensation benefits. The court held that an employee's acceptance of benefits was no bar to recovering damages.\textsuperscript{106} The court relied on its decision in \textit{Blankenship} and reasoned that if an employee must elect between workers' compensation and common law damages it would effectively encourage employers to commit intentional torts.\textsuperscript{107} This follows from the fact that the injured worker is unable to await a lengthy court proceeding, and will often be forced to unjustly accept workers' compensation.\textsuperscript{108} This forced election also enables the employer to summarily escape true responsibility for its abuse.\textsuperscript{109} In addition, the court denied that its decision would doubly compensate workers because an award of damages would be supplemental to an award under the Act.\textsuperscript{110} An employee would recover damages for pain and suffering, loss of consortium and punitive damages, if warranted.\textsuperscript{111}

In dissent, Justice William Brown was critical of the majority opinion and advocated requiring employees to elect a remedy. Justice Brown cited \textit{Blankenship}, and argued a worker may pursue a common law remedy only because an intentional tort is not compensable under the Act.\textsuperscript{112} That is to say the injury does not arise out of the scope or in the course of employment. Therefore, it is illogical to permit a worker to accept benefits under the Act and then to sue for damages on the theory his injury did not arise out of the course or scope of employment.\textsuperscript{113}

Justice Holmes also dissented from the majority arguing Article II, Section 35 of the Ohio Constitution and Code Section 4123.74 deny any supplemental remedy to an already existing award of compensation under the Act.\textsuperscript{114} Justice Holmes also argued that the majority's expansive definition of an intentional tort created a gray area between an intentional act and a negligent act.\textsuperscript{115}

In reviewing these cases, one is able to witness a marked change in Ohio Supreme Court doctrine. By liberally construing the Act in favor of

\textsuperscript{105}Jones, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051.
\textsuperscript{106}Id. at 99, 472 N.E.2d at 1054.
\textsuperscript{107}Id.
\textsuperscript{108}Id.
\textsuperscript{109}Id.
\textsuperscript{110}Id., 472 N.E.2d at 1055.
\textsuperscript{111}Id. at 102, 472 N.E.2d at 1055.
\textsuperscript{112}Id.
\textsuperscript{113}Id. at 104-05, 472 N.E.2d at 1057.
\textsuperscript{114}Id. at 106, 472 N.E.2d at 1058-59.
\textsuperscript{115}Id. at 107, 472 N.E.2d at 1060.
employees the court is willing to recognize a common law claim when it determines the injury does not arise out of the course or scope of employment. This position stands in stark contrast to earlier decisions denying any relief collateral to the Act even when the employee was injured by the alleged intentional tort of the employer.

This policy of liberal construction has, however, not been without problems. The decision in Jones has caused pronounced in-fighting among members of the court itself. Moreover, the line separating an intentional act and a negligent act did arguably become less clear in the minds of countless appellate court judges. This uncertainty is reflected in the numerous cases decided after Jones in which courts of appeal split over whether an injured employee had stated a cause of action against his employer for an intentional tort. From an objective viewpoint it appeared that courts were hesitant to conclude that, as a matter of law, an employer did not intentionally injure an employee. Theoretically, the law was “clear” as defined by the syllabus in Jones, however in practice courts viewed the law as confused.

The liberal construction policy of the court also sparked extrajudicial debate in scholarly comments, industry, and in the newspapers. Employers and the press jointly proclaimed that the state would not be able to attract and maintain industry. The strongest debate engendered by the court’s decisions was, however, not to be found in a tabloid or publication. Instead it was to be found in the Ohio General Assembly which was busy preparing its own

116 The court in Blankenship focused on R.C. 4123.95, a rule of construction, which provides the Workers’ Compensation Act shall be liberally construed in favor of employees and their dependents. Blankenship, 69 Ohio St. 2d at 612, 433 N.E.2d at 576. Under the new law, Section 4121.80, the intentional tort exception is not to be construed liberally in favor of employees. J. HARRIS, THE OHIO WORKERS’ COMPENSATION ACT: SENATE BILL 307, at 52, (1986).


119 For appellate decisions affirming summary judgment for an employer See, e.g., Wallace dba Airport Service v. Tri State Motor Transport (unreported, No. L85-227 Lucas County Court of Appeals, 1985); Blake v. Halliburton Services (unreported, No. CA-85-19 Muskingham County Court of Appeals, 1985); Merritt v. Saalfeld (unreported C-84719 Hamilton County Court of Appeals, 1985).


120 See articles cited supra note 5.

121 Harris, supra note 116, at 33.
legislative response to the Blankenship line of cases.

III. THE LEGISLATIVE RESPONSE: SENATE BILL 307

In direct response to the liberal construction policies of the judiciary, the legislature enacted Senate Bill 307. The headnote of the Bill purports it was enacted to “[A]uthorize employees to bring intentional tort suits against employers under certain circumstances . . .” This comment will now focus on those certain circumstances as outlined in section 4121.80 of the law.

Section 4121.80(A) provides that if a worker is intentionally injured by his employer, the worker or his dependants have the right to collect workers' compensation benefits and have a cause of action against the employer for an excess of damages over the amount received or receivable under the Act. This set-off provision was probably added to the law on the basis of Justice Holmes' dissenting opinion in Jones that it is illogical to provide an employee with worker's compensation and common law damages without a set-off provision. On its face, the set-off provision appears easily applicable; the amount received or receivable is simply subtracted from damages awarded as a common law recovery. However, in practice this provision may prove unwieldy.

The language of the statute itself, “amount received or receivable,” will generate questions over whether it includes future benefits that have not yet been awarded. An employee will prudently argue that any off-set will be limited to the amount of workers' compensation benefits received as of the date of a verdict favoring the employee. This is a plausible argument inasmuch as section 4121.80 is written in the disjunctive. Obviously, then, the legislature did intend that the total of both amounts received and receivable should be set-off.

Conversely, the employer will argue that if the cumulative amount of both compensation benefits received and receivable are not deducted from a common law award then the set-off provision will be emasculated. In support of this position, an employer could point to subsection (D) of 4121.80 where the legislature used only the word 'receivable' in expressly discussing the set-off.

In an interview Senator Richard Finan, the sponsor of Senate Bill 307, stated as his main goal “the reversal of the Blankenship problem for intentional tort and putting that back under the Workers' Compensation System, per se, instead of the court of common pleas.” Harris, supra note 116 at 31.

LAWS OF OHIO --, Amended Substitute Senate Bill 307.

Id.

OHIO REV. CODE ANN. § 4121.80(A) (Anderson 1986) (emphasis added).


The preceding arguments are based primarily on the case of Mooney v. Eastern Associated Coal Co. discussed in Comment, In Wake of Mandolidis: A Case Study of Recent Trials Brought under the Mandolidis Theory -- Courts are Grappling with Procedural Uncertainties and Juries are Awarding Exorbitant Damages for Plaintiffs, 17 W. VA. L. REV. 893, 909-14 (1982).
provision. Further, the Jones court concluded that a common law recovery was a supplemental award of damages not available under the Act.\(^{128}\) Thus, to prevent double compensation to an injured worker all compensation benefits, both received and receivable, must be set-off under 4121.80(A).

Assuming a court rules that the entire “amount received and receivable” under the Act is subject to offset, further problems will arise in implementing the decree depending on the type of benefits an employee is entitled to. If an employee is entitled to a scheduled award under section 4123.57(B),\(^ {129}\) the amount to be off-set will not be difficult to calculate because generally the court will be working with a sum certain amount. The amount of the scheduled award is simply subtracted from the common law award.

Nevertheless, if an employee is totally disabled or fatally injured, the difficulty in calculating the “amount receivable” under the Act greatly increases. Sections 4123.56(A)\(^ {130}\) and 4123.57\(^ {131}\) of the Act impose technical limitations on awards to injured employees. In addition, depending on the age or experience of an employee at the time he is injured, awards may periodically be upwardly adjusted.\(^ {132}\) The possibility of adjustments makes it more difficult to determine precisely the amount receivable under the Act.

The legislature should clarify the meaning of the “received or receivable” language currently used in the law. Since the set-off provision is central to a worker’s common law damage award, the issue will certainly arise in litigation. If the legislature determines both awards received and receivable are to be set-off from a common law award then the law should be amended to avoid the difficulties inherent in calculating the amount an employee will receive under the Act.

\(^{128}\)Jones, 15 Ohio St. 3d at 99, 472 N.E.2d at 1055 (1984).

\(^{129}\)Ohio Rev. Code Ann. § 4123.57(B) (Anderson 1986). Compensation under this section shall be in sixty-six and two-thirds percent of an employee’s weekly wage, but not more than equal to the statewide weekly wage regardless of the average weekly wage, and not less than forty percent of the statewide weekly wage and shall continue for the duration of the period outlined by the schedule. Id.

\(^{130}\)Ohio Rev. Code Ann. § 4123.56(A) (Anderson 1986) (as amended by S.B. 411). This section provides in pertinent part:

In the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of his average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third and one-third per cent of the minimum statewide average weekly wage, in which event he shall receive compensation equal to his full wages; provided that for the first twelve weeks of total disability he shall receive compensation equal to his full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of his full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code.


\(^{132}\)See Ohio Rev. Code Ann. § 4123.62 (Anderson 1986). Subsection (A) provides: If it is established that an injured or disabled employee was of such age and experience when injured or disabled as that under natural conditions his wages would be expected to increase, that fact may be considered in arriving at his average weekly wage.
In amending the law, the legislature has two viable alternatives from which to choose, both of which are currently utilized by other states. The first alternative would be to increase workers' compensation benefits by a specific percentage upon the determination that an employee was intentionally injured. This would largely obviate the need for complicated calculations of possible amounts receivable under the Act. The second alternative already used in other states is to require an employee to elect to receive benefits under the Act or to sue at common law for an intentional injury. This method of compensation already has received judicial approval in Ohio through the dissenting opinions of Justice Holmes and Justice Brown in Jones.

Section 4121.80(A) also provides that “[A]ll defenses are preserved for and shall be available to the employer in defending against an action brought under this section.” The exact import of the “all defenses” language is unclear. However, on its face the statute at least contemplates that, in defending against a claim, an employer will be able to assert the three common law defenses of contributory negligence, assumption of the risk and the fellow servant rule.

Unquestionably, these three defenses apply to a negligence action. However, it is highly questionable that these defenses would apply to an intentional tort, particularly in a state such as Ohio where contributory negligence and assumption of the risk have been merged into comparative negligence for purposes of fault apportionment.

In Viock v. Stowe-Woodward, the Erie County Court of Appeals has already considered the applicability of comparative negligence to an intentional tort. The court concluded that neither comparative negligence, nor by implication, assumption of the risk, can serve as a defense to an intentional tort. In arriving at its conclusion, the court noted that there was no precedent in Ohio and thus looked for guidance to other jurisdictions which had considered the issue. The court ultimately looked to the law of six states and to the law as interpreted by the Tenth Circuit Court of Appeals. In all cases, the defenses of contributory negligence and assumption of the risk were inap-

133 The following states increase an employee's benefits under the Act by a specific percentage for injuries caused through intentional conduct: Cal. Lab. Code § 4553 (West 1986) (Employee award increased by 50% plus costs when injured by employer's willful misconduct); Mass. Gen. Laws Ann. ch. 152 § 28 (West 1986) (Employees award doubled if injured by employer's willful misconduct); N.C. Gen. Stat. § 97-12(3) (1985) (Compensation increases 10% for willful failure of employer to follow safety statute).
135 Jones, 15 Ohio St. 3d at 102-07, 472 N.E.2d at 1058-61 (1984).
137 See Anderson v. Ceccardi, 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983) (Assumption of the risk merged with contributory negligence for purposes of fault apportionment under R.C. 2315.19, the comparative negligence statute).
139 Id. at 47.
plicable as a defense to an intentional tort. The court reasoned that both of these defenses were grounded in negligence and based on a person's duty of care towards himself. However, a person does not have a duty to protect himself from the intentional tort of another. The court concluded by stating: "Based on the weight of the foregoing analysis, . . . where an intentional tort instruction is presented to the jury in an employee injury case a comparative negligence instruction has no relevance; its application is wholly misplaced as a defense . . . for reducing a damage award."

Similarly, inasmuch as the fellow servant doctrine is also a concept based in negligence it has no application in an intentional tort case. The fellow servant rule, as a defense, has been limited to the point that it is used solely to reduce a plaintiff's damage award on the basis of comparative negligence. Inasmuch as the Viock court held comparative negligence is no defense to an intentional tort, the applicability of the fellow servant rule appears marginal. Moreover, the rules of respondeat superior, in the opinion of one commentator, would hold the employer vicariously liable for the misconduct of a fellow employee towards the injured worker.

Despite the inapplicability of the common law defenses to an intentional tort action, an employer is not defenseless. In addition to the common law defense of consent, section 4121.80(C) expressly provides that the court is to utilize its power to summarily adjudicate a claim or to grant a directed verdict if a plaintiff-employee fails to substantiate his allegations of intentional injury.

In light of this discussion, the legislature should clarify the "all defenses" language presently contained in section 4121.80(A). In drafting a more specific statutory amendment the legislature should recognize that courts and com-

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141 "Viock at 47.


143 Id. at 534 n. 71 citing McKee v. New Idea Inc., 36 Ohio Law Ab. 563, 44 N.E.2d 697 (Mercer County Court of Appeals 1942).


145 OHIO REV. CODE ANN. § 4121.80(C). A summary judgment is a procedure which permits any party to a civil action to move for a judgment on a claim, counterclaim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. BLACK'S LAW DICTIONARY 1287 (5th ed. 1979). See also OHIO R. CIV. P. 56.

A directed verdict is a procedure utilized when the party with the burden of proof has failed to present a prima facie case for jury consideration. The judge in these circumstances may enter a verdict without allowing a jury to consider it. BLACK'S LAW DICTIONARY supra at 413. See also OHIO R. CIV. P. 50.
mentators uniformly agree that the defenses of contributory negligence and assumption of the risk, either separately or merged as comparative negligence, are not defenses to an intentional tort. Similarly, the fellow servant rule is also a negligence defense and is therefore inapplicable to an intentional tort.

Section 4121.80(A) also provides that claims for intentional injuries shall be brought within one year after the death of an employee or the date on which the employee knew or reasonably should have known of the injury, disease, or condition, whichever date occurs first. However, no claim shall be brought more than two years after the occurrence of the act constituting the intentional tort.146

It appears that in drafting this statute of limitations147 the legislature essentially adopted a “discovery rule”148 which tolls the statute until the employee discovers or should have discovered the injury giving rise to a cause of action. The discovery rule was essentially developed for use in the area of medical malpractice and some courts have held the rule to be inapplicable outside that area, particularly when an injury does not manifest itself immediately.149

Applying the limitations set out above imposes no hardship when the injury is readily ascertainable. Conversely, when the injury is not readily apparent, applying the statute may lead to anomalous results. For example, a court could determine an employee should have discovered he contracted silicosis at a much earlier time than when he actually knew he had it. Similarly, with an insidious disease a court could determine that the act constituting the injury occurred over two years before an employee filed suit against his employer. In either instance the employee’s suit is time barred by the statute of limitations.

In order to rectify this problem, the legislature should amend the statute of limitations set out in section 4121.80(A) and provide an extra time period for an employee to state a cause of action when his employer intentionally causes him to contract an insidious disease. This comment proposes the following limitation period:

An action for bodily injury shall be brought within two years after the cause thereof arose. For purposes of this section, a cause of action for bodily injury caused by intentional exposure to asbestos, or to chromium in any of its chemical forms arises upon the date on which the plaintiff is

147A statute of limitations prescribes limitations to the right of action on prescribed causes of action; that is declaring no suit shall be maintained on such causes of action unless brought within a specified period of time after the right accrued. Black’s Law Dictionary 835 (5th ed. 1979).
148As used in this comment, “discovery rule” refers to a rule providing a cause of action accrues when the injury has been discovered by the injured party. It does not refer to a civil rule of procedure regulating evidentiary discovery prior to trial. See Clutter v. Johns-Manville Sales Corp., 646 F.2d 1151 (6th Cir. 1981).
149Id. See also Bazdar v. Koppers Co., Inc., 524 F. Supp. 1194 (D.C. Ohio 1981) appeal dismissed, 705 F.2d 451 (Insidious disease manifested when there is perceptible sign of disease and not when disease should have been discovered).
informed by competent medical authority that he has been injured by such exposure, or upon the date on which the disease has manifested.\textsuperscript{150}

The typical statute of limitations is inapplicable to cases where a disease may manifest itself many years after the act constituting the injury has elapsed. Thus, the proposed statute prevents an intentionally injured employee from being prematurely barred from stating a cause of action. A statute of limitations does not guarantee victory to a plaintiff. Rather it merely allows him to state a cause of action. If the cause is unfounded it will be dismissed on the merits and should not be barred on procedural grounds.

Subsection B of 4121.80 provides, in part, that the enactment of Chapter 4123 of the Revised Code and the Workers’ Compensation System is intended to remove from the common law tort system all employer-employee disputes except as expressly provided.\textsuperscript{151} The sole common law cause of action expressly provided in § 4121.80 is for an intentional tort. Subsection B then appears to be the exclusive exception to the otherwise exclusive provisions of workers’ compensation.

Taking the legislature at its word, however, leads one to question the viability of other judicially recognized common law causes of action against an employer by an injured employee, such as the dual capacity doctrine.\textsuperscript{152} This doctrine recognizes that an employer may act in a second capacity thereby assuming obligations towards an employee unrelated to those imposed on it as an employer.\textsuperscript{153} The Ohio Supreme Court recognized the dual capacity doctrine in \textit{Guy v. Arthur H. Thomas Co.}\textsuperscript{154} where a hospital employee sued the employer-hospital for alleged medical malpractice.\textsuperscript{155}

In recognizing plaintiff’s claim against her employer the \textit{Guy} court stated:

Where an employer-hospital occupies a second or dual capacity, as an administering hospital, . . . an employee injured, as a result of a violation of the obligations springing from employer-hospital’s second or dual capacity, is not barred by either section 35 of Article II of the Ohio Constitution or R.C. 4123.74, . . . from recovering in tort from that employer hospital.\textsuperscript{156}

\textsuperscript{150}The proposed statute of limitations is a hybrid based upon currently existing OHIO REV. CODE § 2305.10 and upon the interpretation of the statute promulgated in \textit{Clutter}.

\textsuperscript{151}OHIO REV. CODE ANN. § 4121.80(B) (Anderson 1986).

\textsuperscript{152}For a definition of the dual capacity doctrine \textit{See supra} note 3.


\textsuperscript{154}55 Ohio St. 2d 183, 378 N.E.2d 488 (1979).

\textsuperscript{155}Id. The plaintiff-employee was a laboratory technician who suffered from mercury poisoning. Plaintiff alleged the employees of the employer-hospital negligently failed to diagnose her condition as mercury poisoning which aggravated her original condition. \textit{Id.} at 184, 378 N.E.2d at 489.

\textsuperscript{156}Id. at 183, 378 N.E.2d 488. For additional cases in which an employer may be liable to an employee for breach of a duty while acting in a second capacity \textit{See Wright v. United States}, 717 F.2d 254 (6th Cir. 1983); \textit{Chaddock v. Jones-Manville Sales Corp.}, 599 F. Supp. 204 (S.D. Ohio 1984); \textit{Walker v. Mid States Terminal Inc.}, 17 Ohio App. 3d 19, 477 N.E.2d 1160 (1984); \textit{Delamotte v. Midland Ross}, 64 Ohio App. 2d 159, 411
The court went on to reason that, "[t]here seems to be no logical reason why an employer-doctor, when he undertakes to treat an industrial injury, should not be responsible in a civil action for his negligent act in treating the injury."

Essentially, the dual capacity doctrine places an employee on equal footing with any other negligently injured person. When the employer assumes an extra duty of care towards an employee, and then breaches that duty, the law prudently authorizes recovery. Moreover, if this cause of action is swept away by the broad language in section 4121.80(B) then an employee will be forced to show he was injured as the result of an intentional tort. The employee will not be able to surpass this burden, however, because by design the dual capacity doctrine encompasses only unintentional acts. Thus, the employee will remain uncompensated for his injury. Therefore, in attempting to circumscribe an employer’s common law liability the legislature should not tamper with the dual capacity doctrine.

Subsection D of 4121.80 limits the role of the court to the determination of an employer’s liability for an alleged intentional tort. If liability is established, the Industrial Commission will then determine the amount of damages to be awarded. Moreover, subsection C provides it is the intent of the legislature to promote prompt judicial resolution of issues relative to an employer’s civil immunity.

In this section, the import of the words ‘court’ and ‘judicial’ give rise to considerable implications. If the word ‘court’ is interpreted to mean a judge and jury then subsection D is not prone to constitutional challenge. However, if the term ‘court’ is interpreted to mean solely ‘judge’, then subsection D will be challenged as violating a person’s constitutional right to a trial by jury.

The Ohio Constitution provides in part, “The right of trial by jury shall be


Guy, 55 Ohio St. 2d at 188, 378 N.E.2d at 491.


Id. at § 4121.80(C) (emphasis added).

See Fidelity Finance Company v. Harris, 102 Ohio App. 497, 126 N.E.2d 812 (1955) (“Court” is composed of judge, jury, clerks, bailiff, and other attaches and not judge alone).

See In re Ely, 92 Ohio L. Ab. 282, 194 N.E.2d 784 (1963) (Court is incorporeal political being composed of one or more judges); Black’s Law Dictionary, 318 (5th ed. 1979) (‘Court’ and ‘judge’ frequently used a synonymous in statutes).
inviolate...". Despite this language, it has been judicially determined that only if a trial by jury existed in such action prior to the adoption of the Constitution is the right inviolate. Otherwise, in order to demand a jury trial in a cause of action the right to so demand must be conferred by statute. If the right to a jury trial is statutorily based, then the legislature may rescind the right by altering the statute.

Thus, for purposes of analyzing section 4121.80(D), the critical inquiry becomes, prior to the adoption of the Ohio Constitution, did the right to trial by jury exist in a suit brought to recover for personal injuries? A review of early Ohio case law finds that in State ex rel. Pond v. Fassig, the Franklin County Court of Common Pleas discussed the issue. The court stated: "Was the right of trial by jury, where one person sought to recover damages of another for a personal injury, recognized as a right before the adoption of the Constitution of 1851, and at the common law? Of this there can be no doubt."

The court then discussed the origin of the common law right to a trial by jury in a personal injury case.

We trace our rule of compensation for injury by award of damages to the Anglo Saxon law. And at an early period it became an established rule that these damages were to be assessed by trial by jury. The jury was not confined to a mere question of determining the fact of liability, but it was a principal part of the function of the jury to determine the quantum of damages.

Under the new law, the legislature has arguably eliminated the jury process from an employee's claim against his employer for personal injuries. The law now provides that the court will determine liability and the Industrial Commission will determine the amount of damages to be awarded.

However, in light of Fassig, it is evident that prior to the adoption of the Ohio Constitution, a plaintiff in a personal injury case had dual rights. First, an employee had the right to have the issue of liability determined by a jury. Secondly, the jury played an integral role in the determination of damages and...
in the amount of compensation a plaintiff would receive.

Inasmuch as these rights existed prior to the adoption of the Ohio Constitution, they remain inviolate and cannot be vanquished by mere statute. Consequently, the legislature should amend section 4121.80(C) to return the jury to its proper role and thus avoid a constitutional challenge to the statute.

In subsection G of 4121.80, an intentional tort is defined as an “act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.”169 Substantial certainty is then defined as an act done with “deliberate intent to cause an employee to suffer injury, disease, condition or death.”170

This definition of an intentional tort stands in marked contrast to an intentional tort as defined by the Ohio Supreme Court in Jones.171 There, the court defined an intentional tort in paragraph one of its syllabus as: “[a]n act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.”172

The legislature, then, in subsection G has adopted the framework of an intentional tort as established by the Jones court, but has also added its own definition of substantial certainty. However, the term deliberate intent does not readily fit into the Jones-style framework173 because substantial certainty is a concept which is distinct from actual intent to injure.174 Thus, the legislature has seemingly made an apple-orange definition of an intentional tort by defining substantially certain as deliberate intent.

Despite these incongruous results, one thing is certain. In order for an employee to sue his employer for an intentional tort, the employee must show the injury was a product of the employer’s deliberate intent. The term, “deliberate intent,” has largely been defined by negative implication. That is to say, courts utilizing this standard define it in terms of what it is not. Thus, “It is not sufficient to show that there was mere carelessness, recklessness or negligence however gross it may be because deliberate intent implies that the employer must have determined to injure the employee.”175 Stated positively, a deliberate intent to injure has been defined as “an intentional or deliberate act

170Id.
171Jones, 15 Ohio St. 3d at 90, 472 N.E.2d at 1046 (1984).
172Id.
173Substituting the term ‘deliberate intent’ for the term substantial certainty yields the following:
   An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.

174In the absence of an actual intent to injure one may still be liable for an intentional tort when he acts despite a perceived threat of harm that is substantially certain to occur to others. Jones, 15 Ohio St. 3d at 95, 472 N.E.2d at 1050. Essentially then the substantial certainty test is applied in the absence of a specific intent to injure.
by the employer with a desire to bring about the consequences of the act."^{176}

The deliberate intent standard of an intentional tort is more than merely strict in theory. It is fatal in fact.^{177} In the absence of a "left jab to the chin," this standard will preclude an injured worker from recovering for the intentional removal of a safety device or for the intentional exposure of an employee to dangerous conditions.^{178} This would appear to be especially true in cases of insidious diseases which remain latent for a period of many years before any manifestation occurs.

Inasmuch as the legislature has provided an exception to the exclusivity of workers' compensation based on an intentional tort, it should adopt a definition of an intentional injury which is consistent with tort law.

The Restatement of Torts was expressly adopted in *Jones* because, as the court stated, intent is broader than a desire or purpose to bring about physical results.^{179} Rather, if the actor knows the consequences are substantially certain to result from his act and he proceeds to act nevertheless, he has intended to produce the consequences of the act.^{180} It follows then, if an employer causes an employee to work in hazardous conditions, or to be exposed to hazardous chemicals, and the employer believes that in so doing it is substantially certain that the employee will be injured, the employer is liable for an intentional tort if the injury does result.

The Restatement rule is fair to both employers and employees alike. This standard of an intentional tort places a heavy burden on an employee to substantiate his claim of an intentional tort and an employer is not held strictly liable for an employee's injury. Yet, at the same time, an employee is not required to carry the virtually impossible burden required under the deliberate intent standard of an intentional tort. In addition to these substantive defenses, an employer-defendant is afforded the ordinary litany of procedural defenses including motions for a summary judgment, directed verdict, or a judgment notwithstanding the verdict.^{181}

Successful implementation of the Restatement standard will require ac-

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^{177} See *Fryman v. Electric Steam Radiator Corp.*, 227 S.W.2d 25 (1955) (Cause of action not stated on theory of employer's deliberate intent where allegations were that metal press was defective and employer was on notice on condition of machine through prior operations); *Jenkins v. Carman Mfg. Co.*, 79 Or. 448, 155 P. 703 (1916) (employer's knowledge of defective machine, failure to repair it and order to employee to work near it not show deliberate intent to injure); *Hidley v. Weyerhauser*, 13 Wash. App. 269, 534 P.2d 596 (1975) (inadequate plexiglass shielding in sawmill and employer's knowledge of flying cutter heads did not establish deliberate intent to cause employee's eye injury).


The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.

^{179} *Jones*, 15 Ohio St. 3d at 94, 472 N.E.2d at 1051.

^{180} RESTATEMENT, supra note 14, Comment (b).

^{181} For a definition of summary judgment and directed verdict see supra note 145 and accompanying text.
ative participation on behalf of the judiciary. The court must be attentive in its jury instruction to not define intent in terms of negligence. To facilitate the formulation of a proper jury instruction relative to the plaintiff’s burden of proof on the pleaded intentional tort claim, this comment proposes the following jury charge:

To find (the Defendant) liable to pay damages to (the Plaintiff) for an intentional tort, you must find that the Defendant acted or omitted to act with the intent to injure the Plaintiff or acted or omitted to act with the knowledge that such injury was substantially certain to follow. In order to aid your deliberations, “acted or omitted to act with the intent to injure” means, in this context, that the Defendant desired to bring about the physical results of his act or acted for the very purpose of causing the injury. In this context, “acted or omitted to act with knowledge that such injury was substantially certain to follow” means more than the knowledge and appreciation of a risk which might result in injury or which will probably result in injury. Rather, the known danger must cease to become only a possible risk which a reasonable person would avoid, and becomes a substantial certainty.

Moreover, whether a person acted or omitted to act with the intent to injure or with the knowledge that such injury was substantially certain to follow should not be determined with the benefit of hindsight. You must determine what an ordinary and reasonable person in the Defendant’s position knew or should have known in light of all surrounding circumstances at the time of the alleged intentional tort.

Because an intentional injury may result from less than a deliberate intent to injure, the legislature should codify the Restatement definition of intent. The law is fundamentally fair to employees and employers because it requires a plaintiff to prove his case and prevents an employer from escaping liability in all but the most egregious cases. Moreover, a properly formulated jury instruction will prevent the criticism leveled at the Jones decision and thereby maintain a distinction between an intentional act and a negligent act.

Section 4121.80(H) expressly provides that this section applies to any pending intentional tort claim between an employer and employee existing on or after the effective date of the section. In contrast, the Ohio Constitution

182This instruction flows from the premise that if the preceding section of the statute is interpreted to deny a trial by jury to the plaintiff, it will be struck down as unconstitutional.

183See Restatement, supra note 14.

184Id. See also Bazley v. Tortorich, 397 So. 2d 475, 482 (1981) (defining intent for purpose of Restatement as desire to bring about physical results of act).


expressly provides that "The General Assembly shall have no power to pass retroactive laws ..."\textsuperscript{187}

Despite this straightforward language in \textit{Gregory v. Flowers},\textsuperscript{188} the Ohio Supreme Court held the constitutional prohibition against retrospective laws does not apply to laws which are remedial in nature.\textsuperscript{189} The court stated that laws creating or defining substantive rights and which create or destroy the right to sue or defend actions at law cannot constitutionally be retroactively applied.\textsuperscript{190} Conversely, remedial laws providing rules of practice, courses of procedure or methods of review are constitutional even if retrospective.\textsuperscript{191} The categorization of a law as affecting substantive rights or as merely remedial in nature thus becomes a categorization of constitutional magnitude.

To determine whether section 4121.80(H) is subject to constitutional challenge, it is necessary to determine what rights are affected through its retrospective application. A litany of rights are arguably affected by subsection H, including the right to trial by jury, the right of an employee to sue an employer under the dual capacity doctrine, and the burden of proof an employee must sustain in bringing a cause of action for an intentional tort.

In \textit{Jones}, the court adopted the Restatement position in defining an intentional tort.\textsuperscript{192} Conversely, section 4121.80(G)(1) defines substantial certainty as deliberate intent, thus effecting a marked change in the law. One could plausibly argue this heightened intent requirement effectively divests an employee of a vested interest in a cause of action accruing prior to the adoption of the new law.\textsuperscript{193}

Similarly, an employee may also argue that in a cause of action arising before the effective date of the new law an employee had a vested interest in a jury determination of liability and damages,\textsuperscript{194} and an employee had the right to sue an employer under the dual capacity doctrine.\textsuperscript{195} Depending on the precise interpretation of the new law, these vested rights may now be extinguished by the retroactive application of section 4121.80. Thus, it seems as though a retroactive application of the law impedes or removes an employee's ability to bring an action at law to recover his damages and therefore is unconstitutional under the \textit{Flowers} test.

The legislature, in defending its statute, will argue § 4121.80(H) is reme-

\textsuperscript{187}Ohio Const. art. II § 28.
\textsuperscript{188}32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).
\textsuperscript{189}Id. at 52, 290 N.E.2d at 184.
\textsuperscript{190}Id. at 85, 290 N.E.2d at 185.
\textsuperscript{191}Id.
\textsuperscript{192}Jones, 15 Ohio St. 3d 90, 472 N.E.2d 1046.
\textsuperscript{193}Harris, supra note 116, at 49-50.
\textsuperscript{194}Fassig, 18 N.P. 177, 26 Ohio Dec. 408.
\textsuperscript{195}Mercer v. Uniroyal, 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).
dial in nature because it relates to rules of procedure or methods of review. Thus, eliminating the right to a jury trial, the dual capacity doctrine and changing the definition of an intentional tort tampers with no substantive rights. Only the procedural rules of the Act were changed along with the remedies available. The legislature may point out that because workers’ compensation is a creature of statutory origin, the only rights conferred on an employee are ones which are statutorily enumerated. In changing the law then, no vested rights were affected.

However, this defense appears dubious in that the whole purpose in enacting § 4121.80 was to provide for an exceptional remedy to the Workers’ Compensation Act. Thus, the legislature has not changed the rules or remedies available under the Act but has sought to change rights existing outside the Act in the domain of the common law.

Perhaps facially it appears as if section H is only remedial in nature and could therefore be applied retroactively. However, upon closer inspection it is doubtful the section will be able to withstand constitutional scrutiny. The purpose of the constitutional prohibition against retroactive statutes is to protect the citizenry from laws that destroy accrued substantive rights. Therefore, it should not be assumed lightly that, as an advocate of these rights, the courts will acquiesce to the legislature.

**CONCLUSION**

With the enactment of Senate Bill 307, the law of workers’ compensation in Ohio has come full circle. Historically, compensation under the Act was an employee’s sole available avenue for redress of an injury. The judiciary, however, soon created exceptions to this rule, first for occupational diseases and then for the dual capacity doctrine. Most recently the Ohio Supreme Court has recognized the intentional tort exception to workers’ compensation. In its attempt to remedy the perceived intentional tort crisis, the legislature sought to once again make workers’ compensation an employee’s sole remedy.

However, in enacting the new law the legislature has trammelled the legal and constitutional rights of employees across this state. Moreover, Senate Bill 307 does not clarify the law in Ohio relative to workers’ compensation, rather it creates an interpretational quagmire. This comment has discussed some of the deficiencies inherent in Senate Bill 307 and has proposed appropriate alternatives. If the legislature does not clarify its new law then it will be up to the courts to do so. However, until the questions raised in this comment are resolved the lives of many Ohio workers will be held in the balance.

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196Westenberger v. Industrial Comm. 135 Ohio St. 211, 20 N.E.2d 252 (1939).
198Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).