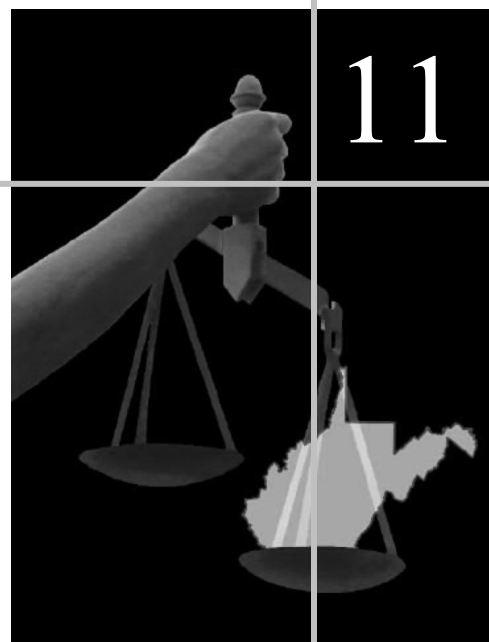


CHAPTER 11



DELIBERATE INTENT, A UNIQUE CAUSE
OF ACTION IN WEST VIRGINIA FOR
EMPLOYEE ON-THE-JOB INJURIES: IS IT
REALLY NEGLIGENT INTENT?

by Ronda L. Harvey

The Rule of Law

11

DELIBERATE INTENT, A UNIQUE CAUSE OF ACTION IN WEST VIRGINIA FOR EMPLOYEE ON-THE-JOB INJURIES: IS IT REALLY NEGLIGENT INTENT?

Ronda L. Harvey

When an employee is injured on the job in West Virginia, the employee does not need to go to court and prove liability against his employer to recover damages. Instead, the employee can file for workers' compensation benefits which pay for his medical treatment and lost wages while he is recuperating.

Most employers in West Virginia are required to maintain workers' compensation insurance, and in turn, are immune from lawsuits stemming from on-the-job injuries. The employer's immunity, however, is lost if the employee can show that his employer deliberately injured him.

The question of what is considered a deliberate injury has been the subject of tremendous debate in both the civil court system and legislative arena for the past three decades. Many believe that West Virginia's current standard is too broadly interpreted, resulting in too many workers' compensation lawsuits, and an unnecessarily high cost of doing business in the state.

This chapter examines the history of West Virginia's legislation and case law regarding deliberate intent, and offers suggested reforms that could help to improve the situation to result in more predictability and fairness in the way these cases are decided.

HISTORY OF CASE LAW AND LEGISLATION REGARDING DELIBERATE INTENT

The West Virginia Workers' Compensation Act was enacted in 1913.¹ The intent of the act is two-fold: (1) to provide injured workers with automatic benefits for work-related injuries,

¹ 1913 W.Va. Acts 64.

regardless of fault, and (2) to insulate employers from the unpredictability of civil tort litigation. The system was designed to be mutually advantageous for both the employer and the employee. The employer contributes to the fund from which employee benefits are paid and in return, the employee and his dependents give up their common law right to sue for any work-related injury. Workers gain because they are guaranteed compensation even if the injury was their fault, while employers gain because they are no longer subject to the costs of frequent litigation and civil tort damages.

From its inception, the West Virginia Workers' Compensation Act specifically granted employers immunity from private tort liability for work-related injuries unless the injuries occurred as the result of the "deliberate intention" of the employer to injure the employee.² For 65 years, the "deliberate intention" exception contained in the Act was construed narrowly by the courts. Tracking the legislative language, the courts typically required an injured employee to show a specific intent of the employer to cause the injury. In the late 1970s, however, deliberate intent litigation took a noticeable turn away from this narrow interpretation.

In 1978, the West Virginia Supreme Court of Appeals decided the landmark case of *Mandolidis v. Elkins Industries, Inc.*³ In *Mandolidis*, the court refused to uphold the employer's immunity from a civil lawsuit in the absence of actual intent to injure, instead holding that "willful, wanton, or reckless" conduct which resulted in a workplace injury fell within the "deliberate intention" exception.⁴

The employee in *Mandolidis* was a machine operator who lost two fingers and part of his right hand when he was operating a ten-inch table saw that did not have a safety guard. The employee alleged the deliberate intention exception applied. The court considered the following facts:

- (i) the employer's table saws were not equipped with safety guards,
- (ii) the employer had removed the safety guards because they slowed production,
- (iii) the operation of the table saws without the safety guards was a violation of both federal and state standards,
- (iv) a federal OSHA inspector had tagged the employer's table saws and ordered that they not be used,
- (v) the employer removed the OSHA tags and continued the operation of the table saws without the guards,
- (vi) prior injuries to other employees had occurred from use of table saws without the required safety guards,

² W.VA. CODE § 23-4-2(c)(2)(Supp. 1991).

³ 246 S.E.2d 907 (W.Va. 1978). The decision reviewed three lower court cases consolidated for appeal, but, unless otherwise noted, the discussion in this chapter centers on the facts of the case involving Mr. Mandolidis and his employer.

⁴ *Id.* at 914.

- (vii) former employees had been discharged for refusing to use the table saws without the guards,
- (viii) current employees were led to believe that the refusal to use the table saws without the guards would result in either their termination or suspension, and
- (ix) the employer knew injuries would be sustained through use of the table saws without the guards and deliberately chose to require use of the saws without the guards for the purpose of maximizing its profits.

While these facts may appear egregious, the trial court “determine[d] that the deliberate intent to injure ... is lacking.”⁵ The trial court granted summary judgment because the facts did not show that the defendant employer acted with “deliberate intent.”⁶ On appeal the Supreme Court disagreed, and overturned the summary judgment holding that “willful, wanton and reckless conduct” is actionable under the deliberate intent exception. This decision changed the standard of proof for a deliberate intent civil action⁷ and opened the proverbial floodgates for three decades of intense, confusing and costly litigation.

Foreshadowing the future, Justice Richard Neely expressed concern in his dissent, noting that “violation of a safety statute alone does not constitute intentional injury; unsafe working conditions do not constitute intentional injury; failure to follow recommended procedures or to take standard precautions, do not constitute intentional injury.”⁸ Justice Neely prophetically predicted that “the tone of the majority opinion invites nuisance lawsuits, a high percentage of which will be settled (particularly by small employers) in preference to sustaining the cost of litigation.”⁹

Some cases were tried and appealed. An article in the 1982 West Virginia Law Review¹⁰ examined six of the early cases that were tried under *Mandolidis*: *Smith v. A.C.F. Industries*,¹¹ *Haverty v. Norris Industries*¹² and *Littlejohn v. Conrail*¹³ (brought in federal court); and *Cline v. Joy Manufacturing Co.*,¹⁴ *Mooney v. Eastern Associated Coal Corp.*,¹⁵

⁵ *Id.* at 918.

⁶ *Id.*

⁷ From the date of the enactment of the Workers’ Compensation Act, the phrase “deliberate intention” was strictly interpreted by the West Virginia Supreme Court. Indeed, just a few years prior to the *Mandolidis* decision, the West Virginia Supreme Court decided *Eisnaugle v. Booth*, 226 S.E.2d 259 (W. Va. 1976). The first syllabus in *Eisnaugle* states: “Neither gross negligence nor wanton misconduct are such to constitute deliberate intention ...” 226 S.E.2d at 259. The law in West Virginia then, prior to *Mandolidis*, held that in order to go to trial on the issue of “deliberate intent,” a plaintiff must allege and support a set of facts which, if proved, would demonstrate advance notice or knowledge of a situation “from which the natural and probable consequence reasonably to be anticipated was death to the employees.” *Mandolidis*, 246 S.E.2d at 911-12; *Maynard*, 175 S.E. at syl. pt. 1.

⁸ *Id.* at 922.

⁹ *Id.* at 923.

¹⁰ David A. Mohler, Note, *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*. 84 W.Va. L. Rev. 893 (1982).

¹¹ Civil Action No. 80-3063 (S.D. W.Va. Feb. 1, 1980).

¹² Civil Action No. 78-2262 (SD. W.Va. Jul. 21, 1978).

¹³ Civil Action No. 79-2404 (S.D. W.Va. Oct. 11, 1979).

¹⁴ Civil Action No. 79-C-8036 (Cir. Ct. Mingo Cty. Mar. 19, 1979).

¹⁵ Civil Action No. 79-C-6648 (Cir. Ct. Boone Cty. 1979).

and *Marcum v. Windsor Power House Coal Co.*¹⁶ (brought in state circuit court). The article notes that these cases alone resulted in over \$6 million in verdicts against employers.¹⁷ Several other civil actions that were brought under *Mandolidis* did not make it to a jury, but were settled instead.

While the large verdicts in deliberate intent cases often make headlines, there are other less-obvious costs associated with deliberate intent litigation. In addition to any monetary verdicts, businesses must spend resources defending against these lawsuits, even if the lawsuit is decided in the business's favor. Even more importantly, the threat of large civil verdicts often leads to cases being settled out of court for inflated amounts. Thus, the cost of doing business in West Virginia is increased not only by the verdicts, but also by the costs of defending against these cases and out-of-court monetary settlements.

In an attempt to reign in deliberate intent litigation, in 1983 the Legislature amended West Virginia Code § 23-4-2. The amended section included language explicitly and unambiguously stating that "willful, wanton, or reckless" conduct is not sufficient, standing alone, to destroy an employer's statutory immunity under the West Virginia Workers' Compensation Act. The amendment also established a five-part test and required the employee to prove each element before the employee could pierce an employer's immunity.¹⁸

The second element required a showing that the employer had "subjective realization" of the specific unsafe working condition and the high degree of risk it presented. By including this element, the legislature demonstrated an intent to depart from the typical negligence

¹⁶ Civil Action No. 80-C-152 (Cir. Ct. Brooke Cty. 1980).

¹⁷ The jury in only one of the six cases examined, *Haverty v. Norris Industries, Inc.* returned a defense verdict.

¹⁸ W.VA. CODE § 23-4-2 (c)(2)(ii)(Supp. 1991).

(2) The immunity from suit provided under this section and under section six-a [§ 23-2-6a], article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention." This requirement may be satisfied only if:

(i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

“should-have-known” standard and instead apply a standard that measures the particular employer’s knowledge of the alleged unsafe condition.

The intent of the legislative exception was understood fully by both sides. Indeed, the International Executive Board of the United Mineworkers of America referred to the amendment as “anti-union,” and refused to hold its 1983 convention in Charleston, West Virginia because of the passage of the amendment.¹⁹

Despite the Legislature’s efforts, the amendment barely slowed the maelstrom of deliberate intent civil lawsuits. Injured employees were rushing to file their lawsuits. While exact data on the number of lawsuits filed is not available, at least 37 of the many deliberate intent lawsuits filed for the first seven years after the 1983 amendment were appealed from the trial court level. This gave the Supreme Court ample opportunity to follow the Legislature’s intent, and narrowly construe the statutory amendment to reduce costly civil litigation. The Supreme Court, however, failed to construe the deliberate intent statute narrowly. In fact, on December 20, 1990, the Court issued an opinion in *Mayles v. Shoney’s, Inc.*²⁰ declaring that the amendment broadened the deliberate intent exception to employer immunity. Prior to *Mayles*, no opinions of the West Virginia Supreme Court of Appeals even inadvertently implied that the 1983 amendment had expanded the deliberate intent exception.

Moving forward, the state Supreme Court continued deciding cases under the new-found premise that the amendment expanded the exception.²¹ The business community made some additional attempts to amend the legislation over several years, and in 2005 the deliberate intent exception was changed again to its present language which requires a showing that the employer had “actual knowledge” as opposed to “subjective realization” that the specific unsafe working condition existed. The 2005 amendment was yet another effort to narrow the deliberate intent exception. However, litigation continues unabated in this murky area of the law. Although the phrases essentially mean the same, the phrase “actual knowledge” is a more plain, concise and understandable phrase that is consistent with the tenor of the statute which attempts to define the act of the employer that constitutes a deliberate intent injury.

¹⁹ See *UMW to Hold Convention in Pittsburgh*, UPI, Mar. 8, 1983, LEXIS, Nexis Library, UPI.

²⁰ 405 S.E.2d 15 (W.Va. 1990). In *Mayles*, a fry-cook at a Captain Ds restaurant was seriously injured when a bucket of hot cooking grease, which he was carrying to a disposal bin, spilled upon him causing severe burns. The employee’s testimony at trial revealed that no one instructed him to wait for the grease to cool down, rather, the grease was always immediately disposed of while it was hot. Further, evidence indicated that an alternate, safer route to the disposal unit was not used because the bucket was too hot and heavy, and the other routes were too long. Certain employees had expressed concerns regarding the unsafe manner in which the hot grease was disposed, but these concerns had not been reported to the unit manager. Finally, testimony revealed that in 1983 another employee had suffered a foot injury in the same manner as the plaintiff. The current manager testified that he was never informed of a prior injury. The lower court in *Mayles* entered judgment on a jury verdict for the plaintiff, and the Supreme Court, with Justice Margaret Workman writing the majority opinion, affirmed the decision. The *Mayles* opinion construed the sufficiency of the evidence as to each requirement involved in the statutory five-part test of West Virginia Code § 23-4-2 and determined that all five elements were met. In the most surprising aspect of the *Mayles* decision, the Court admitted with candor that this was not the case that could probably have prevailed under the extremely narrow concept of deliberate intent enunciated in the *Mandolidis* decision. *Id.* at 23.

²¹ In the post-1983 amendment case of *Blake v. John Skidmore Truck Stop, Inc.*, 493 S.E.2d 887, 892 (1997), the West Virginia Supreme Court noted with irony that “the legislature, in an apparent effort to narrow the parameters of civil liability for employers, has indeed broadened the concept by enactment of the five-part test of W. Va. Code § 23-4-2(c)(2)(ii).”

HOW DOES WEST VIRGINIA'S DELIBERATE INTENT CAUSE OF ACTION COMPARE TO OTHER STATES?

No other state has established an exception to an employers' workers compensation immunity from civil suit for workplace injuries as broad as West Virginia's.²² Many states have no "deliberate intention" exception to employer immunity.²³ The states that do have such an exception require a *specific* intent to injure.²⁴ Cases from other jurisdictions involve a variety of statutes that contain slightly different terminology, but the cases generally fall into two categories: (1) cases rejecting recklessness or gross negligence and requiring a specific intention to cause an injury or death; and (2) cases holding that an employer can be liable for deliberate intention where the employer's conduct is willful, wanton, or reckless.²⁵ The latter category is similar to the West Virginia standard established by *Mandolidis* prior to the 1983 amendment of West Virginia Code § 23-4-2.

In some states that have no statutory deliberate intent exception, courts have held that at least under certain circumstances, a tort action may be brought against an employer for an "intentional" injury because the state's workers' compensation system covers only "accidental" injuries.²⁶ Thus, in some states that have no statutory exception for deliberate injuries, the injured employee may still be allowed to recover damages outside workers' compensation benefits.²⁷ These cases, however, uniformly require showing that the employer had a specific intention to cause the injury.²⁸

DELIBERATE INTENT'S PRACTICAL IMPACT ON BUSINESS IN WEST VIRGINIA AND A REVIEW OF THREE KEY CASES

Business and industry in West Virginia have suffered a huge financial blow from the expansion of the deliberate intent exception. The *quid pro quo* compromise envisioned by the founders of workers compensation has been all but annihilated with the expanded interpretation of the deliberate intent exception. Not only must an employer fund workers compensation benefits for its injured employees, the employer also must bear the cost of defending a civil suit and pay its employees an additional amount for settlement or jury verdicts. Given the complexity of these cases, defense costs can be extremely high. In 2008, the West Virginia Chamber of Commerce estimated an average of over \$275,000 in defense costs per civil action.²⁹

²² See, David B. Harrison, annotation, *What Conduct is Willful, Intentional, or Deliberate Within Workmen's Compensation Act Provision Authorizing Tort Action for Such Conduct*, 96 A.L.R. 3d 1064 (1979 & Supp. 1997).

²³ *Id.* at 1069.

²⁴ *Id.* at 1071-1090.

²⁵ *Id.* at 1068.

²⁶ *Id.* at 1071.

²⁷ *Id.*

²⁸ *Id.*

²⁹ "Deliberate Intent" Lawsuits Threaten State No-fault Workers' Comp., West Virginia Chamber of Commerce, Chamber Links (Feb. 7, 2008).

In addition to defense costs, the various interpretations of the deliberate intent statutory language make it difficult for employers to avoid deliberate intent civil actions. Employees are emboldened by the case law expansions and file civil suit for workplace injuries more often; trial court judges are reluctant to grant summary judgment even though the statute specifically mandates it; and employers can not effectively predict or anticipate what may comply with the statutory language to plan ahead and adequately safeguard the workplace and protect themselves from suit.

We now turn to a discussion of a few cases that highlight West Virginia's lenient interpretation of the deliberate intent exception.

A. *Blake v. John Skidmore Truck Stop, Inc.*

In 1997, the West Virginia Supreme Court of Appeals rendered a significant opinion in *Blake v. John Skidmore Truck Stop, Inc.* that extended deliberate intent liability against employers for the criminal acts of a third party.³⁰ Specifically, a criminal's act of repeatedly stabbing a store clerk while robbing the store's cash register was actionable.³¹ Significantly, the case was before the Supreme Court on the appeal of the employee who lost at the trial stage when the trial court granted a directed verdict at the end of the employee/plaintiff's case. The case was tried a second time, resulting in a complete and final verdict for the defendant/employer. Thus, the employer was forced to incur trial costs twice and was found not liable for deliberate intent. In his dissent, Justice Elliott E. "Spike" Maynard reflected that "this Court's decision in *Skidmore* guarantees that another meritless action, rightfully dismissed by the circuit court, will now go to trial."³² He further stated that:

A lack of security measures in a convenient store in rural West Virginia, which has the lowest crime rate in the nation, simply does not constitute a specific unsafe working condition with a high degree of risk and a strong probability of serious injury or death. This is especially so in light of the apparent lack of evidence that the convenient store has a history of being robbed.³³

One commentator noted that the majority's opinion in *Skidmore* "appears representative of a trend in favor of employees."³⁴ The trend did not stop with *Skidmore*.

B. *Roberts v. Consolidation Coal Co.*

The trend in favor of employees continued in 2000 when the Supreme Court eviscerated the traditional common law defenses available in other tort actions. In *Roberts v. Consolidation*

³⁰ 493 S.E.2d 887 (W.Va. 1997).

³¹ *Id.* at 896-97.

³² *Id.* at 898.

³³ *Id.*

³⁴ Philip R. Strauss, *Deliberate Intention Claims Based on Third-Party Criminal Acts: Blake v. John Skidmore Truck Stop, Inc.*, 101 W.Va. L. Rev. 515 (1999).

Coal Co.,³⁵ the Supreme Court held that neither a defense of the employee's contributory negligence nor a defense of the employee's deliberate intent, as that term is construed by West Virginia Code § 23-4-2(c)(2), is available to employers when the cause of action asserts deliberate intent.³⁶

The Court rationalized that West Virginia Code § 23-4-2(c)(1) was enacted "to establish a system which compensates even though the injury or death of an employee may be caused by his own fault."³⁷ The Court identified self-inflicted injury and injury caused by intoxication as the only two statutory defenses available to employers.³⁸ Based on the plain statutory language, the Court held that contributory negligence is not available to employers as a defense in deliberate intent cases.³⁹ In addition, the Court held that an employer may not assert that the employee's deliberate intent contributed to their injury since the statute does not use that term in reference to employees.⁴⁰

The *Roberts* decision invites the argument that acts of the employee or failure of the employee to act cannot be presented as evidence. Notably, however, the *Roberts* case does not bar evidence by the employer relating to proximate cause and, indeed, such a holding would be legally untenable. The *Roberts* decision simply stands for the proposition that: "when an employee asserts a deliberate intention cause of action against his/her employer, ... the employer may not assert the employee's contributory negligence as a defense to such action."⁴¹

C. Ryan v. Clonch Industries, Inc.

Most recently, the West Virginia Supreme Court of Appeals reviewed the subjective realization/actual knowledge requirement of the deliberate intent statute in *Ryan v. Clonch Industries, Inc.*⁴² In the *Ryan* case, Mr. Ryan was employed as a "banding man" in a lumberyard owned by the defendant. The job duties of a banding man included cutting metal banding from a coil, placing the bands around pallets of lumber, tightening the bands and crimping the ends together.⁴³ On his third day as a banding man, Mr. Ryan was struck in the left eye by a piece of metal banding when he was in the process of cutting it.⁴⁴ Mr. Ryan brought a deliberate intent action under the five element test. He alleged the defendant's failure to provide him with safety glasses was a specific unsafe working condition. To prove the third element – violation of a specific safety regulation, Mr. Ryan relied on the defendant's admitted violation of a certain OSHA regulation requiring the employer to inspect the workplace and assess what personal protective equipment was necessary. The

³⁵ 539 S.E.2d 478 (W. Va. 2000).

³⁶ *Id.* at syl. pts. 8 and 9. Mr. Roberts was injured while working in one of the defendant's mines. The longwall mining shield malfunctioned and Mr. Roberts attempted to restart the shield electronically. When that attempt failed, he tried to manually restart the machine. When the shield resumed operation, Mr. Roberts was crushed. Both his back and neck were severely damaged, and he was unable to return to work. Ultimately, the jury found Mr. Roberts 49% responsible for his injuries, and defendant at fault for the remaining 51%.

³⁷ *Id.* at 493, quoting West Virginia Code § 23-4-2(c)(1).

³⁸ *Id.*

³⁹ *Id.* at 496.

⁴⁰ *Id.* at 496.

⁴¹ 539 S.E.2d at 496.

⁴² 639 S.E.2d 756 (2006).

⁴³ 639 S.E.2d at 759.

⁴⁴ 639 S.E.2d at 769.

defendant argued that Mr. Ryan could not prove actual knowledge because the defendant had not performed the workplace assessment required by the OSHA regulation and thus had no actual knowledge that safety glasses were necessary for the task Mr. Ryan was performing. The West Virginia Supreme Court held that “where the defendant employer has failed to perform a reasonable evaluation to identify hazards in the workplace *in violation of a statute, rule or regulation imposing a mandatory duty to perform the same*, the performance of which may have readily identified certain workplace hazards, the defendant employer is prohibited from denying that it possessed ‘a subjective realization’ of the hazard asserted.”⁴⁵

This holding increases an employer’s difficulty to show a lack of actual knowledge of the unsafe working condition and invites an argument well beyond its holding. Employees now argue that *Ryan v. Clonch* places a general requirement on employers to inspect the workplace. If an employee is injured, the injury was the result of the employers’ failure to inspect the workplace, discern the unsafe working condition and correct it. This argument is compelling and difficult for an injured employee to resist; however, the employee’s argument is flawed because it changes the fundamental nature of the deliberate intent civil action. Essentially, the argument changes the actual knowledge element to a “should have known” or negligence standard. The argument also extends the holding of *Ryan v. Clonch* beyond its limits. Even under *Ryan v. Clonch*, an employer’s failure to inspect negates the actual knowledge defense only when a regulation contains an affirmative duty to inspect.

The decisions in *Skidmore*, *Roberts* and *Ryan v. Clonch* serve as examples of how West Virginia’s deliberate intent statute is being applied, and highlight some of the issues in need of reform. The widespread calls for reform from the business community are echoed by the president of the West Virginia Coal Association, who in 2005 stated that “deliberate intent is a serious problem affecting the entire business community in West Virginia.”⁴⁶ Some legislators have even gone on record saying that deliberate intent is “a substantial deterrent to coal companies.”⁴⁷

CAN AN EMPLOYER OBTAIN INSURANCE FOR DELIBERATE INTENT?

The business community has also expressed concern over the lack of insurance for deliberate intent.⁴⁸ For several years after *Mandolidis* and even after the 1983 amendment, insurance companies were not sure how to deal with a deliberate intent claim brought under policies issued to employers. Specific insurance for deliberate intent did not exist, and insurance companies viewed deliberate intent as an intentional act which was excluded under liability policies. Some insurance companies began offering “stop-gap” insurance to cover deliberate intent actions.

The “Employers’ Excess Liability Fund” was established under Article 4C in Chapter 23 of the West Virginia Code as a vehicle to provide coverage for employers that may be subjected to liability for excess damages because the injury of an employee resulted from the deliberate intention of the employer. This fund and its obligation was transferred to

⁴⁵ 639 S.E.2d at 766.

⁴⁶ *Id.*

⁴⁷ WBOY news posting; Tort Reform Debate Resumes (March 3, 2005).

⁴⁸ *Id.*

BrickStreet⁴⁹ on January 1, 2006. BrickStreet was required by law to offer coverage for deliberate intent until at least June 30, 2008. While BrickStreet is no longer required to offer the coverage, at least at the publication of this chapter, BrickStreet has continued to offer the coverage.

A memo from the West Virginia Office of the Insurance Commissioner (OIC) dated May 27, 2008, expressed concern “that the coverage be generally available for the employers of this state.”⁵⁰ New private carriers entering the market after July 1, 2008 were not required by statute to offer the type of coverage as part of their workers’ compensation policies, and deliberate intent actions are not covered by employers’ liability policies. The Office of the Insurance Commissioner is encouraging private carriers to offer deliberate intent coverage and will provide guidelines to insurers on how to structure the plans.

While insurance coverage would apparently help businesses cope with the costs of deliberate intent litigation, it is important to remember that insurance coverage is not free. In fact, to be actuarially sound the average premium will have to at least equal the average litigation payout. Therefore, while the insurance may lower the risk faced by businesses over the timing and amounts, it does nothing to fundamentally lower the overall costs of deliberate intent litigation on the business community. In addition, these insurance policies have limits on coverage, so they don’t even completely eliminate the risk component as an employee may be awarded damages in excess of the amount covered by the employer’s insurance.

SUGGESTIONS FOR REFORM

Since the enactment of the deliberate intent statute, reforms have been suggested during most legislative sessions. Meaningful reform is difficult because few legislators want to be perceived as thwarting or removing an employee’s right to sue his or her employer. Major reform could occur if courts would simply apply the statutory requirements and strike employee’s civil actions that do not meet all five required elements. This type of reform starts with the West Virginia Supreme Court of Appeals. If the West Virginia Supreme Court of Appeals begins to uphold summary judgments and apply the statute as written instead of interpreting the elements broadly, the trickle down effect would cause trial courts to also apply the required elements in their strictest form.

Several legislative reforms have been suggested. One reform involves clarification of the third element which requires a showing “that the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation...of a commonly accepted and well-known safety standard within the industry or business of the employer[.]” The clarifying language would expressly exclude equipment or operator’s manuals, maintenance manuals, or similar product manuals. In addition, the clarifying language would include a provision

⁴⁹ BrickStreet Insurance is a private company borne out of the former West Virginia Workers’ Compensation Commission, which was the state’s only provider of workers’ compensation coverage. BrickStreet became a privately held mutual Jan. 1, 2006, and assumed many of the obligations of the former state-run system. Beginning July 1, 2008, the workers’ compensation insurance market in West Virginia opened to other private carriers, and BrickStreet was relieved of some of its mandatory coverage responsibilities.

⁵⁰ Memorandum to Attendees of April 8, 2008 Carrier Conference Regarding Deliberate Intent, W.Va. Ins. Comm’r. (May 27, 2008).

stating that the “statute, rule, regulation or standard” specifically applied to the alleged unsafe working condition.

Another reform that has been suggested involves clarifying whether a deliberate intent cause of action may be brought against a supervisor. The reform would include language that specifically excludes a supervisor or management personnel from being named individually in an action filed under the statute.

CONCLUSION

To experience sustained economic growth, West Virginia must have a competitive business climate. The growth of deliberate intent litigation stands in the way of that goal. As long as our neighboring states continue to have legal systems that better handle workplace injury claims, West Virginia will be at a competitive disadvantage in attracting and retaining industrial jobs.

Attempts have been made to reform deliberate intent law in West Virginia, and some positive changes have occurred. However, often these positive legislative steps have been undone in the court system. Accordingly, more reform is needed to ensure that an employee’s right to recovery is interpreted in a fair and predictable manner that does not unduly harm the economic prosperity of all West Virginians by creating an uncompetitive business climate.

REFERENCES

- Harrison, David B. 1979 & Supp. 1997. What Conduct is Willful, Intentional, or Deliberate Within Workmen's Compensation Act Provision Authorizing Tort Action for Such Conduct. *96 A.L.R. 3d 1064, 1068-1069, 1071-1090.*
- Mohler, David A. 1982. 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. *84 W Va. L. Rev. 893.*
- Strauss, Philip R. 1999. Deliberate Intention Claims Based on Third-Party Criminal Acts: *Blake v. John Skidmore Truck Stop, Inc. 101 W.Va. L. Rev. 515.*
- UMW to Hold Convention in Pittsburgh, UPI, Mar. 8, 1983, LEXIS, Nexis Library, UPI.
- WBOY News Posting; Tort Reform Debate Resumes (March 3, 2005).
- West Virginia Chamber of Commerce, Chamber Links. Feb. 7, 2008. "Deliberate Intent" Lawsuits Threaten State No-fault Workers' Comp.
- West Virginia Insurance Comm'r. May 27, 2008. Memorandum to Attendees of April 8, 2008 Carrier Conference Regarding Deliberate Intent.

CASES AND LAWS CITED

- Blake v. Skidmore Truck Stop, Inc.*, 493 S.E.2d 887 (1997).
- Cline v. Joy Manufacturing Co.*, Civil Action No. 79-C-8036 (Cir. Ct., Mingo Cty. Mar. 19, 1979).
- Eisnaugle v. Booth*, 226 S.E.2d 259 (W. Va. 1976).
- Haverty v. Norris Industries*, Civil Action No. 78-2262 (S.D. W.Va. Jul. 21, 1978)
- Littlejohn v. Conrail*, Civil Action No. 79-2404 (S.D. W.Va. Oct. 11, 1979).
- Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907 (W.Va. 1978).
- Marcum v. Windsor Power House Coal Co.*, Civil Action No. 80-C-152 (Cir. Ct. Brooke Cty. 1980).
- Mayles v. Shone's, Inc.*, 405 S.E.2d 15 (W.Va. 1990).
- Mooney v. Eastern Associated Coal Corp.*, Civil Action No. 79-C-6648 (Cir. Ct. Boone Cty 1979).
- Roberts v. Consolidation Coal. Co.*, 539 S.E.2d 478 (W.Va. 2000).
- Ryan v. Clonch Industries, Inc.*, 639 S.E.2d 756 (2006).
- Smith v. A.C.F. Industries*, Civil Action No. 80-3063 (S.D. W.Va. Feb. 1, 1980).
- W.VA. CODE § 23-4-2(c).
- West Virginia Workers' Compensation Act, (1913 W.Va.).