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The Continuing Workers' Compensation Controversy in Ohio: Is Ohio Revised Code Section 4121.80 (D) Unconstitutional?

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THE CONTINUING WORKERS' COMPENSATION CONTROVERSY IN OHIO: IS OHIO REVISED CODE SECTION 4121.80(D) UNCONSTITUTIONAL?

I. INTRODUCTION

Since the Ohio Supreme Court's decisions in *Blankenship v. Cincinnati Milacron Chemicals Inc.*,[1] and *Jones v. VIP Development Co.*,[2] and the subsequent legislative response set forth in Ohio Revised Code section 4121.80,[3] workers' compensation litigation in Ohio has been in a severe state of disarray. In the 1982 *Blankenship* opinion, the Ohio Supreme Court held that injuries suffered by employees as a result of intentional torts committed by their employers are outside the coverage of Ohio's workers' compensation system as established pursuant to article II, section 35 of the Ohio Constitution and the corresponding legislation in Ohio Revised Code section 4123.[4] In *Blankenship*, the Ohio Supreme Court reasoned that because an intentional tort arises outside of the scope of employment, an employee injured in such a manner is not precluded from bringing an action at common law.[5] The Ohio Supreme Court's holding in *Blankenship* followed several similar holdings by lower courts,[6] and opened the door to expand employer liability for intentional torts.[7]

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1. 69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982). For law review discussions on *Blankenship*, see Ballam, *Intentional Torts in the Workplace: Expanding Employee Remedies*, 2 WORKERS' COMPENSATION L. REV. 189 (1989); Note, *Workers' Compensation in Ohio: Scope of Employment and the Intentional Tort*, 17 AKRON L. REV. 249 (1983); Note, *Intentional Torts in the Workplace*, 10 KY. L. REV. 355 (1983); Note, *Blankenship v. Cincinnati Milacron Chemicals Inc.*, 51 U. CIN. L. REV. 682 (1982). For general discussions of *Blankenship* and related material, see 2A A. LARSON, THE LAW OF WORKMENS' COMPENSATION, § 68.15, at 13-53 (1990); B. PETRIE, INNOVATIONS IN OHIO WORKPLACE INJURY LAW: INTENTIONAL TORTS, VSSRs, THIRD PARTY LIABILITY, AND INDEPENDENT CONTRACTORS (1988).

2. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).

3. OHIO REV. CODE ANN. § 4121.80 (Baldwin 1990). For law review discussions on Ohio Revised Code section 4121.80, see Note, *The New Workers' Compensation Law in Ohio: Senate Bill 307 Was No Accident*, 20 AKRON L. REV. 491 (1987); Note, *Ohio's Attempt To Circumvent The Concept of Intentional Tort—Enactment of Revised Code Section 4121.80*, 16 CAP. U.L. REV. 280 (1986); Note, *S.307: Ohio's New Workers' Compensation Law—At Least for Now*, 12 U. DAYTON L. REV. 489 (1986).

4. *Blankenship*, 69 Ohio St. 2d at 612-13, 433 N.E.2d at 575-76.

5. *Id.* One commentator states, "[t]he most fictitious theory of all is that the assault does not arise out of the employment; for if it is a work-connected assault, it is no less so because the assailant happens to be the employer." 2A A. LARSON, *supra* note 1, § 68.11, at 13-5.

6. *See, e.g.*, Delmotte v. Midland-Ross, 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978); Hamilton v. East Ohio Gas Co., 47 Ohio App. 2d 55, 351 N.E.2d 775 (1973).

7. *See* Harvey, *Insuring and Defending Employer Liability in a Blankenship/Jones Action: A Contemporary Analysis of Workplace Intentional Torts in Ohio*, 54 DEF. COUNS. J. 226

In *Jones*, the Ohio Supreme Court reaffirmed its holding in *Blankenship*, and clarified several points. The court started with the adoption of the Restatement Second of Torts definition of an intentional tort: "[A]n 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."[8] In addition, the court held that even if an injured employee began receiving workers' compensation benefits, she was not precluded from likewise suing the employer at common law based on an intentional tort.[9] The result of the re-definition of intentional tort in *Jones* was a lowering of the standard of deliberate or specific intent which was traditionally required to establish an intentional tort under the Workers' Compensation Act.[10] Practically, this lowering of the standard permitted more suits to be filed alleging an intentional tort against employers which allowed common law proceedings to occur outside of the immunity of the Workers' Compensation Act and exposed employers to unpredictably large damage awards.[11]

These two decisions, *Blankenship* and *Jones*, resulted in a tremendous controversy,[12] culminating in 1986 with the passage of legislation[13] which again changed the unstable area of employer's liability

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(1987), *reprinted in* 11 WORKERS' COMPENSATION L. REV. 163, 173-74 (1988) (citations herein from reprinted version).

8. *Jones*, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051 (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

9. *Id.* at 98-99, 472 N.E.2d at 1054.

10. Before *Jones*, the only court to define an intentional tort in a workers' compensation case did so in regard to the "willful act" language of the 1911 Worker's Compensation statute. 1911 Ohio Laws 524 (repealed 1931 Ohio Laws 26). In *McWeeny v. Standard Boiler and Plate Co.*, the federal district court held that something less than deliberate intent to do bodily injury was necessary to create a "willful act." 210 F. 507 (N.D. Ohio 1914). However, the legislature immediately re-defined "willful act" as one done knowingly or purposely with the direct object of injuring another. *See infra* note 43. Even though that legislative definition was repealed in 1931, *see infra* note 52, many courts assumed application of the legislative definition of willful acts required knowledge and purpose with the direct intention of injuring another. For example, in *Gains v. Webster Mfg. Co.*, the court of appeals ruled that the plaintiff had failed to prove that defendant's conduct was intentional. 11 Ohio B. 182, 466 N.E.2d 576 (1983), *rev'd*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984). The court reasoned that an act, to be considered an intentional tort, must have as its purpose the intent to inflict injury. *Id.* at 184, 466 N.E.2d at 578. Also, in *Hamlin v. Snow Metal Products*, the court of appeals had ruled that plaintiffs failed to demonstrate that defendants knowingly subjected plaintiffs to recognized hazards for the purpose of injuring them. *Cited as* Jones v. VIP Development Co., 15 Ohio St. 3d 90, 91, 472 N.E.2d 1046, 1048 (1984).

11. *See* Harvey, *supra* note 7, at 173-74.

12. *See* 2A A. LARSON, *supra* note 1, § 68.15, at 13-53 to 13-55; W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 80, at 576 (5th ed. 1984); Harvey, *supra* note 7, at 173-74.

13. Act of Aug. 22, 1986, 1986 Ohio Laws 718 (codified at OHIO REV. CODE ANN. § 4121.80 (Baldwin 1990)). The legislative response to the holdings of the Ohio Supreme Court in *Blankenship* and *Jones* was Ohio Revised Code § 4121.80 which provides at subparagraph (A)

when an intentional tort has been committed against an employee by an employer. The purpose of the legislation was to return intentional tort actions under the Workers' Compensation Act to their pre-*Blankenship* status which required "deliberate intent" rather than the lower standard of "substantial certainty."[14] This was done in order to quell the perception that a "workers' compensation 'crisis'" existed in Ohio.[15] However, the legislation has also been the focus of much debate, and has far from cleared the muddy waters of intentional tort litigation under the Workers' Compensation Act.[16]

Among the most ardent criticisms of the legislation is that it abolishes a worker's right to a jury trial in an intentional tort action

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that employees have a right to receive Workers' Compensation for injuries resulting from intentional torts of their employers and have a cause of action against the employer for an "excess of damages" over the amount received as workers' compensation. OHIO REV. CODE ANN. § 4121.80(A) (Baldwin 1990). Thus, the statute specifically preserves a common law right to sue when an injury has been intentionally inflicted by an employer. Furthermore, the statute announces at subparagraph (B) the intent of the legislature to "remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided." *Id.* § 4121.80(B). The section provides employers with "immunity from common law suit . . . to protect those so immunized from litigation outside the workers' compensation system." *Id.*

The statute continues at subparagraph (D) to provide that "[i]n any action brought pursuant to this section, the court is limited to a determination [of liability] on the basis that an employer committed an intentional tort. If the court determines that the employee . . . is entitled to an award . . . the industrial commission shall . . . determine what amount of damages should be awarded." *Id.* § 4121.80(D). At subparagraph (G)(1) the statute defines "intentional tort" as "an act committed with the intent to injure . . . or . . . with the belief that the injury is substantially certain to occur," and further defines "substantially certain" as acting with "deliberate intent to injure." *Id.* § 4121.80(G)(1).

14. *Compare* OHIO REV. CODE ANN. § 4121.80 (G)(1) (Baldwin 1990) (substantially certain meaning with deliberate intent) *with Jones*, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051 (substantially certain not requiring deliberate intent).

15. Note, *S.307: Ohio's New Workers' Compensation Law—At Least For Now*, 12 U. DAYTON. L. REV. 489, 495 (1986).

16. The following courts have held Ohio Revised Code section 4121.80(D) to be unconstitutional: Seth v. Capitol Paper Co., No. 11539 (Ohio Ct. App. Aug. 29, 1990) (LEXIS, States library, Ohio file); Leathers v. Elder-Beerman Stores Corp., No. 11427 (Ohio Ct. App. Nov. 27, 1989) (LEXIS, States Library, Ohio file); Ulman v. Clyde Super Valu, No. S-88-48 (Ohio Ct. App. Sept. 22, 1989) (LEXIS, States library, Ohio file); Perry v. Goff, No. 13583 (Ohio Ct. App. Dec. 28, 1988) (LEXIS, States library, Ohio file); Howard v. Ravenna Auto Parts, Inc., No. 1835 (Ohio Ct. App. July 29, 1988) (LEXIS, States library, Ohio file); Schnieder v. Jefferson Smurfit Corp., 42 Ohio App. 3d 53, 536 N.E.2d 691 (1988); Bishop v. Hybud Equip. Corp., 42 Ohio App. 3d 55, 536 N.E.2d 694 (1988); Palcich v. Mar Bal, Inc., No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file). The following courts have held Ohio Revised Code section 4121.80(D) to be constitutional: Brady v. Safety-Kleen Corp., 710 F. Supp. 684 (E.D. Ohio 1989); Bertilino v. Wheeling Pittsburgh Steel Corp., No. C85-156A (N.D. Ohio Apr. 15, 1987) (LEXIS, Genfed library, Dist file); Clegg v. Quarto Mining Co., No. 638 (Ohio Ct. App. May 5, 1989) (LEXIS, States library, Ohio file); Kowal v. Ohio Poly Corp., 34 Ohio Misc. 2d 22, 518 N.E.2d 616 (1987).

brought under the Ohio Workers' Compensation Act.[17] Several Ohio appellate courts and commentators argue that Ohio Revised Code section 4121.80(D) is unconstitutional because it destroys a worker's right to a jury trial in an intentional tort action.[18] This is so because the right to a jury trial existed in the class of case to which this type of action belongs prior to the adoption of the Ohio Constitution of 1802.[19] Furthermore, the language of Ohio Revised Code section 4121.80 returned the definition of an intentional tort to "deliberate intent," making the "substantial certainty" language of the *Blankenship-Jones* intentional tort action irrelevant in the consideration of the constitutionality of the legislature's abolition of a jury trial in a workers' compensation intentional tort action.[20]

This comment addresses the constitutional question of the right to a jury trial surrounding Ohio Revised Code section 4121.80(D).[21] First, this comment presents a brief history of the workers' compensation system in the United States and Ohio. Second, this comment analyzes the constitutional questions surrounding Ohio Revised Code section 4121.80(D) that have been raised by the various courts which have addressed the issue. Third, this comment explores the historical action of trespass and its evolution into the modern intentional tort. Fourth, this comment examines the right to a jury trial in both the historical trespass action and the modern intentional tort action. Finally, this comment concludes by recommending a return to the worker the constitutional right to a jury trial in an intentional tort action under the Ohio Workers' Compensation Act.

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17. *See* Van Fossen v. Babcock and Wilcox Co., 36 Ohio St. 3d 100, 522 N.E.2d 489 (1988). In *Van Fossen,* the court held that the retroactive application of section 4121.80 violated the ban on retroactivity of article II, section 28 of the Ohio Constitution. *Id.* at 109, 522 N.E.2d at 504. Furthermore, the court interpreted § 4121.80(G), holding that the section imposes a new and more difficult standard for the intent requirement of a workers' compensation intentional tort than that articulated in *Jones. VanFossen,* 36 Ohio St. 3d *Id.* at 116, 522 N.E.2d at 504. In *Kneisley v. Lattimer-Stevens Co.*, the court interpreted Ohio Revised Code section 4121.80(D) and held that the right to a jury trial is a substantive right that may not be abridged. 40 Ohio St. 3d 354, 357, 533 N.E.2d 743, 747 (1988). Thus, the *Kneisley* court held that section 4121.80(D) may not be applied retroactively. *Id.* Moreover, the Ohio Supreme Court concluded in *Kneisley* that the right to a jury trial for an intentional tort existed at common law and that Ohio Revised Code section 4121.80(D) destroys the right altogether. *Id.* at 357, 533 N.E.2d at 746. In *Kneisley,* the Ohio Supreme Court failed to reach the issue of the constitutionality of section 4121.80(D). *Id.* In *State ex rel. Carpenter v. Industrial Comm'n.*, the Ohio Supreme Court declined to issue a writ of mandamus to the Industrial Commission to pay the amount of a jury verdict in a case governed by section 4121.80. 50 Ohio St. 3d 85, 86, 552 N.E.2d 645, 646 (1990). The court held that the statute gives the Industrial Commission exclusive jurisdiction to determine damages. *Id.* The court failed to address the constitutionality of that result.

18. *See* cases cited *supra* note 17 and accompanying text; *see also, e.g., supra* note 5.

19. *See infra* text accompanying note 93.

20. *See infra* text accompanying notes 151-68.

21. OHIO REV. CODE ANN. § 4121.80(D) (Baldwin 1990).

II. BACKGROUND

A. *History of Workers' Compensaton in the United States*

The origin of the workers' compensation system in this country lies in the inability of the common law to deal with the onset of modern industrialization and the resulting toll on human lives.[22] Prior to workers' compensation, employers' responsibilities to employees were limited to a few very specific obligations.[23] Even when an employer failed to exercise one of these few obligations, the possibility of recovery by an injured worker was hampered by what has been referred to as the "unholy trinity" of common law defenses available to the employer: 1) contributory negligence; 2) assumption of risk; and 3) the fellow servant rule.[24] As industry developed and grew, the efficacy of the common law approach to the problem of industrial injuries declined.[25] The system of work injury relief "which had its origins in the personal relationships between two persons became less effective as those relationships became more and more remote."[26] The dissatisfaction with the existing plan increased with the rapidly advancing status of the worker within the social system.[27] By 1900, America's search for a more effective method of handling work-related injuries had begun in earnest.[28]

The workers' compensation system which arose in response to the injustice of the common law plan of recovery for work-related injuries

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22. W. PROSSER & W. KEETON, *supra* note 12, § 80, at 571-72 n.43 (70-80% of industrial accidents under the common law system the injured worker uncompensated); J. YOUNG, WORKMENS' COMPENSATION LAW OF OHIO § 1.7, at 5 (2nd ed. 1987).

23. W. PROSSER & W. KEETON, *supra* note 12, § 80, at 568-69.

The specific common law duties of the master for the protection of his servants were commonly classified as follows:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools, and equipment for the work.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of fellow servants.
5. The duty to enforce and promulgate rules for the conduct of employees which would make the work safe.

Id. § 80, at 569.

24. *Id.* "[W]orkers were required to exercise reasonable care for their own safety, and in the absence of applicable defenses, their recovery was barred by their contributory negligence." *Id.* Furthermore, a worker might be denied recovery on the basis that he or she assumed the risk of a dangerous work environment, even where the employer had clearly violated a duty. *Id.* § 80, at 570. Finally, an employer was usually not liable for injuries caused solely by the negligence of a fellow servant because the worker was said to assume this risk as part of the employment. *Id.* § 80, at 570-71.

25. J. YOUNG, *supra* note 22, § 1.7, at 5.

26. *Id.* § 1.7, at 6.

27. *Id.*

provided an efficient method of no-fault recovery.[29] As Dean Prosser commented: "[t]he theory underlying the workers' compensation acts never has been stated better than in the old campaign slogan, 'the cost of the product should bear the blood of the workman.' "[30] The basic theory behind the workers' compensation system is that the financial burden of the injured employee is taken from the shoulders of the employee and transferred onto the shoulders of the employer "who is expected to add it to his costs, and so transfer it to the consumer."[31] Thus, workers' compensation is a form of strict liability, with employers as insurers who absorb the cost of industrial injury and "pass[] it on in the form of increased prices and lower wages."[32] In addition, employers relinquish their "unholy trinity" of common law defenses.[33] In return, employees give up their common law negligence claims against their employers and settle for the assurance of diminished, but swift, compensation under the workers' compensation system.[34] The remedy is in the nature of a compromise, with the injured worker accepting limited compensation in return for a "quick, certain, and standardized recovery."[35]

B. Workers' Compensation in Ohio

In 1911, Ohio passed its first workers' compensation statute.[36] The first workers' compensation act was purely voluntary.[37] An employer who chose not to participate was liable at common law without benefit of the traditional "unholy trinity" of common law defenses.[38] Employ-

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29. Ghiardi, *Intentional Acts—An Exception to the Exclusivity of Worker's Compensation*, 11 WORKERS' COMPENSATION L. REV. 132, 133 (1989). Essentially, workers' compensation eliminated fault on the part of the employer as a basis for recovery by the injured employee. W. PROSSER & W. KEETON, *supra* note 12, § 80, at 573. Workers' compensation also eliminated the employer defenses of contributory negligence, assumption of risk, and the fellow-servant rule. *Id.* Typically, a showing that the employee's injury was in some manner job-related was often all that was necessary for recovery of monetary compensation by the employee. *Id.* America's workers' compensation statutes have their roots in the German Dual Contribution Model, and the British Social Insurance Model. 1 A. LARSON, *supra* note 1, § 5.20; Harvey, *supra* note 7, at 164. *See generally* Perlin, *The German and British Roots of American Workers' Compensation Systems: When is an "Intentional Act" "Intentional"?*, 15 SETON HALL L. REV. 849, 852 (1985).

30. W. PROSSER & W. KEETON, *supra* note 12, § 80, at 573 (citations omitted).

31. *Id.*

32. Ghiardi, *supra* note 29, at 133-34; *see* W. PROSSER & W. KEETON, *supra* note 12, § 80, at 573.

33. W. PROSSER & W. KEETON, *supra* note 12, § 80, at 574.

34. *Id.*

35. Ghiardi, *supra* note 29, at 134. Today, workers' compensation statutes are present in all fifty states. *Id.* at 132.

36. Act approved June 15, 1911, 1911 Ohio Laws 524 (repealed 1931 Ohio Laws 26).

37. *Id.*; J. YOUNG, *supra* note 22, § 1.10, at 8.

38. J. YOUNG, *supra* note 22, § 1.10, at 8; *see supra* text accompanying note 24 for description of unholy trinity.

ers who did participate were granted immunity from common law actions with only two exceptions. "The first was for a willful act, and the second was for failure to comply with an ordinance, statute, or lawful [requirement] designed for the protection of employee safety."[39] "In either event, the injured employee had the option to proceed under the workers' compensation law or to bring an action for damages against his employer. The employers' liability act applied to the optional negligence action, but not to the action based upon a wilful act."[40]

The 1912 Constitutional Convention passed an amendment which made possible a compulsory workers' compensation system.[41] Pursuant to article II, section 35 of the Ohio Constitution, the General Assembly enacted a compulsory workers' compensation act in 1913 which was practically identical to the voluntary act.[42] The constitutional amendment itself did not explicitly refer to an injury caused by a willful act on the part of the employer. However, the 1913 compulsory act provided for the same willful act and lawful requirement exceptions present in the 1911 voluntary act.[43]

After 1913, one of the initial interpretive questions which faced the Ohio Supreme Court was to determine what constituted a "lawful requirement."[44] The early decisions of the Ohio Supreme Court restricted lawful requirements to precise and definite standards rather than a general course of conduct.[45] However, in *Ohio Automatic Sprinkler Co. v. Fender*,[46] the Ohio Supreme Court extended the meaning of lawful requirement to include general directives to provide safe places of employment.[47] The effect of the *Fender* ruling was to expand em-

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39. Harvey, *supra* note 7, at 168-69; *see also* J. YOUNG, *supra* note 22, § 1.09, at 2 (Supp. 1989).

40. J. YOUNG, *supra* note 22, § 1.09, at 2 (Supp. 1989).

41. *Id.* § 1.11, at 9; *see* OHIO CONST. art. II, § 35.

42. Act of March 14, 1913, 1914 Ohio Laws 508 (repealed 1931 Ohio Laws 26).

43. *Id.* The exceptions read: "An employer . . . who shall pay into the state insurance fund the premiums provided by this act shall not be liable to respond in damages at common law or by statute, save as in hereinafter provided . . . ." *Id.* "But where a personal injury is suffered by an employee . . . and . . . such injury has arisen from the willful act of such employer . . . or from the failure of such employer . . . to comply with . . . any statute . . . such injured employee . . . may, at his option . . . institute proceedings in the courts for his damage . . . ." *Id.* In 1914, the legislature amended the statute, defining "willful act" as an "act done knowingly and purposely, with the direct object of injuring another." 1914 Ohio Laws 192, 194. The employer's action had to show a conscious intent to inflict injury upon the employee. Gildersleeve v. Newton Steel Co., 109 Ohio St. 341, 348, 142 N.E. 678, 680 (1924).

44. J. YOUNG, *supra* note 22, § 3.11.2, at 53 (Supp. 1989).

45. *Id.*

46. 108 Ohio St. 149, 141 N.E. 269 (1923).

47. *Id.* at 174, 141 N.E. at 277; *see also* J. YOUNG, *supra* note 22, § 3.11.2, at 53 (Supp. 1989).

ployer liability.[48] This resulted in an amendment[49] to article II, section 35 of the Ohio Constitution, passed by the voters in 1923.[50] The immediate consequence of the constitutional amendment was to overule *Fender* and return lawful requirements to the pre-*Fender* definition requiring precise and definite standards.[51] In 1931, the exception for willful acts was held by the Ohio Supreme Court to have been repealed by implication when the 1923 amendment to the Ohio Constitution was adopted.[52] This left the compulsory act as an "absolute immunity to employers at common law for compliance with the funding provision,"[53] even for so-called "willful" acts.

The workers' compensation system in Ohio began with the recognition of two exceptions, willful act and lawful requirement, to employer immunity from employee common law actions.[54] "With the adoption [in 1923] of the amendment to Article II, § 35, Constitution of Ohio, the employer was liable for violations of specific safety requirements, but had immunity from actions based on wilful acts."[55] This situation existed until 1973 when the Lucas County Court of Appeals in *Hamilton v. East Ohio Gas Co.*[56] held that Ohio Revised Code sections 4123.74 and 4123.741 provided employer defenses but did not provide for absolute immunity from common law suits for intentional torts.[57]

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48. J. YOUNG, *supra* note 22, § 3.11.2, at 53 (Supp. 1989).

49. The amendment read:

> 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.

Mabley & Carew Co. v. Lee, 129 Ohio St. 69, 74, 193 N.E. 743, 747 (1934) (quoting 1923 Ohio Laws 631).

50. 1923 Ohio Laws 631; *see* J. YOUNG, *supra* note 22, § 3.11.2, at 54 (Supp. 1989).

51. J. YOUNG, *supra* note 22, § 3.11.2 at 53 (Supp. 1989). This had the effect of once again tightening the exclusivity of the Workers' Compensation Act in spite of the Ohio Supreme Court's effort to loosen it. *Id.*

52. *Lee*, 129 Ohio St. at 74, 193 N.E. at 747. The willful acts exception was specifically repealed by the General Assembly in 1931. 1931 Ohio Laws 39.

53. Harvey, *supra* note 7, at 170-71. 1914 Ohio Laws 508 codified as OHIO GEN. CODE § 1465-70 became OHIO REV. CODE § 4123.74 which reads in pertinent part:

> [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 any employee in the course of or arising out of his employment . . . .

OHIO REV. CODE ANN. § 4123.74 (Baldwin 1990).

54. Act approved June 15, 1911, 1911 OHIO LAWS 524.

55. J. YOUNG, *supra* note 22, § 3.11.2, at 54 (Supp. 1989).

56. 47 Ohio App. 2d 55, 351 N.E.2d 775 (1973).

57. *See* Hamilton v. East Ohio Gas Co., 47 Ohio App. 2d 55, 351 N.E.2d 775 (1973).

Subsequently, in *Delamotte v. UnitCast Division of Midland-Ross Corp.*,[58] the Lucas County Court of Appeals completely denied immunity under Ohio Revised Code section 4123.74 to an employer where an intentional tort was alleged.[59] In *Delamotte*, the employer discovered that the employee was suffering from silicosis but failed to inform the employee, who was unaware of his condition.[60] The court relied on an unprecedented interpretation of the 1959 amendment to Ohio Revised Code section 4123.74 which stated that an employer shall not be liable for any injury which arises "in the course of or relating to employment."[61] Judge Brown, later a Justice of the Ohio Supreme Court, writing for the majority, reasoned that the above language was added by the General Assembly to mitigate the negative results of earlier cases which held that workers' compensation was the exclusive remedy for employees working for employers who are in compliance with Ohio Revised Code section 4123.35 and not include within its scope, injuries arising due to the intentional misconduct of an employer.[62] Judge Brown also reasoned that the Ohio Workers' Compensation Act, which calls for a liberal construction in favor of employees, allows a court the flexibility to exclude an employer from the immunity provided by the Workers' Compensation Act where an intentional tort is alleged.[63] The

58. 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978).

59. *Id.* at 164, 411 N.E.2d at 818.

60. *Id.* at 160, 411 N.E.2d at 815.

61. *Id.* at 161, 411 N.E.2d at 816.

62. *Id.* at 163, 411 N.E.2d at 817; *see* Bevis v. Armco Steel Co., 86 Ohio App. 525, 93 N.E. 2d 33 (1949) (holding workers' compensation to be the exclusive remedy for those employers in compliance with Ohio Revised Code section 4123.35 and denying plaintiff's claim for deceit and fraud), *appeal dismissed per curiam*, 153 Ohio St. 366, 91 N.E.2d 479 (1950), *cert. denied*, 340 U.S. 810 (1950); *see also* Greenwalt v. Goodyear Tire & Rubber Co., 164 Ohio St. 1, 128 N.E.2d 116 (1955). In *Greenwalt* the Ohio Supreme Court denied a worker's common law claim for fraud based on the holding of *Bevis*. *Id.* However, the dissent in *Greenwalt* suggested that any misconduct by employees clearly outside the Workers' Compensation Act could be maintained at common law. *Id.* at 9, 128 N.E.2d at 121. Professor Young disagrees with the court in *Delamotte* that the 1959 amendment to Ohio Revised Code section 4123.74 was the legislature's response to the unjust results of *Bevis* and *Greenwalt*. J. YOUNG, *supra* note 22, § 3.11.2, at 54 (Supp. 1989). Instead, Young suggests that the amendment was in response to *Gee v. Horvath*, in which the Court held the immunity of an employer did not extend to a fellow employee. *Id.* (discussing *Gee*, 169 Ohio St. 14, 157 N.E.2d 354 (1959) and *Delamotte*, 64 Ohio App. 2d at 163, 411 N.E.2d at 817). If this were true, it would certainly remove one of the basic premises for the *Delamotte* court's argument and would indicate that the amendment was instead designed to tighten the exclusivity of the Workers' Compensation Act. J. YOUNG, *supra* note 22, § 3.11.2, at 54 (Supp. 1989).

63. *Delamotte*, 64 Ohio App. 2d at 163-64, 411 N.E.2d at 817-18; *see* OHIO REV. CODE ANN. § 4123.95 (Baldwin 1990) "Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees." *Id.* In *Szekley v. Young*, the Ohio Supreme Court, referring to Ohio Revised Code section 4123.95 stated: "[a] direction to liberally construe a statute in favor of certain parties will not authorize a court to read into the statute something which cannot reasonably be implied from the language of

Delamotte court held that an intentional tort is not an injury which arises "in the course of or relating to employment," and, therefore, an employee may bring an intentional tort action outside the immunity of the workers' compensation statute. Thus, *Delamotte* allowed an employee to bring suit against her employer for an intentional tort and defined it as an "act done knowingly and purposely with the direct object of injuring another."[64]

The *Delamotte* decision was embraced by the Ohio Supreme Court with the decisions in *Blankenship v. Cincinnati Milacron Chemicals*[65] and *Jones v. VIP Development Co.*[66] In *Blankenship*, the plaintiffs alleged physical injury resulting from Cincinnati Milacron and several individual employees knowingly exposing plaintiffs to noxious fumes from certain chemicals, and failing to correct the situation or to warn plaintiffs of the inherent danger.[67] The plaintiffs further alleged that these actions constituted "intentional, malicious, and . . . willful and wanton disregard of [the defendants' duty to protect] the health of [the plaintiffs] . . . ."[68] In *Blankenship*, the Ohio Supreme Court, in an opinion written by Justice Brown, held that the Ohio Workers' Compensation Act[69] only grants immunity to employers for injuries or diseases received or contracted in the course of or arising out of the employment relationship.[70] Following the rationale articulated by Justice Brown in the Ohio appellate case of *Delmotte*,[71] the Ohio Supreme Court held that an employer's intentional conduct does not arise out of the employment relationship and thus no immunity is bestowed upon the employer by the Workers' Compensation Act.[72] The *Blankenship* court further reasoned that an intentional tort is not an act which may be deemed to have occurred in the employment relationship because it cannot reasonably be assumed as a natural risk of employment.[73] Therefore, an employee may resort to a common law suit for damages.[74]

The Ohio Supreme Court further analyzed the intentional tort in

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the statute." 174 Ohio St. 213, 218, 188 N.E.2d 424, 428 (1963).

64. 64 Ohio App. 2d at 163, 411 N.E.2d at 817; *see* 1914 Ohio Laws 192-94. This signaled Ohio's return to the willful act exception definition of an intentional tort. *See supra* note 52.

65. 69 Ohio St. 2d, 433 N.E.2d 572 (1982); *see supra* text accompanying notes 1-7.

66. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984); *see also supra* text accompanying notes 8-11.

67. 69 Ohio St. 2d at 609, 433 N.E.2d at 573.

68. *Id.* at 609, 433 N.E.2d at 574.

69. OHIO REV. CODE ANN. § 4123.01-.99 (Baldwin 1990).

70. 69 Ohio St. 2d at 613, 433 N.E.2d at 576.

71. 64 Ohio App. 2d at 159, 411 N.E.2d at 814.

72. 69 Ohio St. 2d at 612-13, 433 N.E.2d at 575-76.

73. *Id.* at 613, 433 N.E.2d at 576; *see* supra note 5 and accompanying text.

74. 69 Ohio St. 2d at 613, 433 N.E.2d at 576.

the context of the Workers' Compensation Act in *Jones v. VIP Development Co.*[75] *Jones* was comprised of three cases, all consolidated for their common questions on appeal.[76] All three cases involved the common question of whether an intentional tort required a specific intent to injure.[77] Also at issue was whether a common law suit was precluded because of the employee's receipt of workers' compensation benefits, and whether a common law recovery was to be reduced by any other award received.[78] All three cases were reversed by the Ohio Supreme Court on the ground that the appellate courts had applied the wrong standard of intent for an intentional tort.[79] These appellate courts required that an employer must act with "deliberate intent" in order for an employee to establish a claim for an intentional tort under the Workers' Compensation Act. In reversing, the Ohio Supreme Court held that "an intentional tort is an act committed with the intent to injure another *or the belief that such injury is substantially certain to occur.*"[80] The court also held that receiving workers' compensation benefits does not preclude an employee from bringing a common law intentional tort action against his employer. Further, an employer liable for an intentional tort is not entitled to a set-off in the amount of workers' compensation benefits received by the employee.[81]

In *Blankenship*, the Ohio Supreme Court brought Ohio back to the pre-1923 view that an employer's intentional conduct is outside of the immunity of the Workers' Compensation Act.[82] In *Jones*, the court lowered the requirement of specific or deliberate intent to injure by defining 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.*"[83]

The legislative response to this judicial return came swiftly.[84] In passing Ohio Revised Code section 4121.80, the General Assembly attempted to put the intentional tort 'genie back in its bottle' for good. While the statute preserved an employee's right to sue her employer for

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75. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).

76. Jones v. VIP Development Co., No. 84-139 (Ohio Ct. App. 1984); Gains v. City of Painesville, No. 84-339 (Ohio Ct. App. 1984); Hamlin v. Snow Metal Products, No. 84-409 (Ohio Ct. App. 1984).

77. 15 Ohio St. 3d at 96, 472 N.E.2d at 1050.

78. *Id.* at 99-100, 472 N.E.2d at 1054-55.

79. *Id.* at 95, 472 N.E.2d at 1051.

80. *Id.* (emphasis added).

81. *Id.* at 99-100, 472 N.E.2d at 1054-55.

82. 69 Ohio St. 2d at 613, 433 N.E.2d at 576-77.

83. 15 Ohio St. 3d at 95, 472 N.E.2d at 1051 (emphasis added).

84. OHIO REV. CODE ANN. § 4121.80 (Baldwin 1990); *see supra* text accompanying notes

an intentional tort,[85] seemingly following the court's holding in *Blankenship*, the statute denied to an employee the right to a jury trial.[86] Additionally, using language very similar to that used in the *Jones* decision,[87] the statute heightened the standard required for an intentional tort by defining "substantial certainty" to mean "deliberate intent."[88] Thus far, the Ohio Supreme Court has sustained Ohio Revised Code section 4121.80 and it has remained in effect.[89] However, recent Ohio appellate court decisions question the constitutionality of Ohio Revised Code section 4121.80, in particular subsection (D).[90] There is a split of authority on this question,[91] specifically concerning the right to a jury trial.

III. ANALYSIS

A. *The Constitutionality of Ohio Revised Code Section 4121.80(D)*

Article I, section 5 of the Ohio Constitution states that "the right of trial by jury shall be inviolate."[92] It is well settled that the Ohio Constitution preserves the right to a jury trial only in the class of cases in which the right was enjoyed before its adoption, or, generally speaking, for the class of cases where the right to a jury trial existed at English common law.[93] The Ohio Supreme Court has interpreted the

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85. OHIO REV. CODE ANN. § 4121.80(A) (Baldwin 1990).

86. *Id.* § 4121.80(D).

87. *Compare Jones*, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051 (defining intentional tort as an "act committed with the intent to injure another or with the belief that such injury is substantially certain to occur") *with* OHIO REVISED CODE ANN. § 4121.80(G)(1) (defining intentional tort as "an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur").

88. OHIO REV. CODE ANN. § 4121.80(G)(1); *see also Blankenship*, 69 Ohio St. 2d at 608, 433 N.E.2d at 572; *supra* text accompanying notes 13-14.

89. Kneisley v. Lattimer-Stevens Co., 40 Ohio St. 3d 354, 533 N.E.2d 743 (1988). Although it has remained in effect, it is not functioning entirely as the legislature intended due to the Ohio Supreme Court's refusal to apply the statute retroactively. *Id.* at 356, 533 N.E.2d at 745. Clearly, the legislature intended for section 4121.80 to be applied retroactively. OHIO REV. CODE ANN. § 4121.80(H) (Baldwin 1990). However, in *Kneisley*, the Ohio Supreme Court held retroactive application of section 4121.80(D) to be in violation of Ohio Constitution, article II, section 28 because the right to a jury trial is substantive and not merely procedural and therefore the legislature may not retrospectively eliminate the right. 40 Ohio St. 3d at 357, 533 N.E.2d at 746-47. In *Van Fossen v. Babcock & Wilcox Co.*, the Ohio Supreme Court held retroactive application of section 4121.80(G) to be unconstitutional because it also violated the constitutional ban on retroactive application of a statute. 36 Ohio St. 3d 100, 109, 522 N.E.2d 489, 498 (1988).

90. *See* cases cited *supra* note 16.

91. *Id.*

92. OHIO CONST. art. I, § 5.

93. Belding v. State *ex rel.* Heifner, 121 Ohio St. 393, 169 N.E. 301 (1929). The seventh amendment to the United States Constitution also preserves the right to a jury trial in a similar manner. *E.g.*, Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916). The seventh amendment to the United States Constitution states: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S.

language of Ohio Revised Code section 4121.80(D) to mean that any "action" for an intentional tort brought under section 4121.80 must be tried to the court without the benefit of a jury.[94] Furthermore, the court has held that section 4121.80(D) destroys the right to a jury trial in these types of actions "altogether."[95] However, in sections 4121.80(A) and (B),[96] the legislature has created an exception to the exclusivity of the Workers' Compensation Act, and thus, an exception to employer immunity for an intentional tort action as defined in section 4121.80(G).[97] In doing so, the legislature authorized the bringing of a civil action for "an excess of damages over the amount received or receivable under Chapter 4123 of the Revised Code and Section 35 of Article II, Ohio Constitution, or any benefit or amount . . . paid for by the employer,"[98] yet, removed the case from the jury.[99] Because section 4121.80(D) destroys the right of trial by jury, it has caused controversy among the Ohio courts which have addressed the issue of its constitutionality.[100]

One of the first courts to address the issue of the constitutionality of section 4121.80(D) was the United States District Court for the Northern District of Ohio in *Bertolino v. Wheeling-Pittsburgh Steel Corp.*[101] In *Bertolino*, the district court was forced to decide whether to proceed with a bench trial pursuant to section 4121.80(D) or, as plaintiffs argued, to declare section 4121.80(D) unconstitutional and to order a jury trial.[102] The plaintiffs presented several theories supporting the constitutional infirmity of section 4121.80(D), including an argument that the statute's abolition of a jury trial violated their fourteenth amendment right to equal protection.[103] However, the plaintiffs' most

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CONST. amend. VII.

94. Kneisley v. Lattimer-Stevens Co., 40 Ohio St. 3d 354, 357, 533 N.E.2d 743, 747 (1988).

95. *Id.*

96. OHIO REV. CODE ANN. § 4121.80(A)-(B) (Baldwin 1990).

97. *Id.* § 4121.80(G); *see* B. PETRIE, *supra* note 1, at 14.

98. *Id.* § 4121.80(A).

99. *Id.*

100. *See* cases cited *supra* note 16.

101. No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file).

102. *Id.* (court rejected plaintiff's argument citing Goetz v. Aetna Casualty & Surety Co., 710 F.2d 561 (9th Cir. 1983)).

103. *Id.* Plaintiffs' argued that the statute's abolition of jury trials violated both article I, section 5 of the Ohio Constitution and the seventh amendment to the United States Constitution. However, the district court did not reach the seventh amendment question because the plaintiffs failed to brief the issue. *Id.* In *Brady v. Safety-Kleen Corp.*, the court rejected a seventh amendment challenge to Ohio Revised Code section 4121.80(D). 710 F.Supp. 684 (S.D. Ohio 1989) (citing Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917) (upheld a state workers' compensation scheme against a seventh amendment challenge)). The court in *Brady* stated that the seventh amendment applied to federal courts, that the claim in-

compelling argument was that the abolition of jury trials in intentional tort actions under section 4121.80 violated their constitutional right to a trial by jury under article 1, section 5 of the Ohio Constitution.[104] The district court in *Bertolino* framed the ultimate issue in this manner: "[I]s this the type of civil case which existed at common law and which carried with it a right to a jury trial before the Ohio Constitution was adopted?"[105] The court answered this question by concluding that the definitional nature of an intentional tort enunciated by the Ohio Supreme Court in *Jones v. VIP Development Co.*,[106] created a new cause of action unknown at common law prior to the adoption of the Ohio Constitution of 1802.[107] For this reason, the *Bertolino* court held that Ohio Revised Code section 4121.80 does not violate article I, section 5 of the Ohio Constitution and proceeded with a bench trial.[108] However, other courts in Ohio have reached a different conclusion concerning the constitutionality of Ohio Revised Code section 4121.80(D).[109]

One court reaching this different conclusion was the Geauga County Court of Appeals in *Palcich v. Mar Bal, Inc.*[110] In this case, the employee was injured in the course of his employment and received workers' compensation benefits.[111] The employee subsequently filed a complaint alleging "that his employer knew that the machine he was using was faulty but let him operate it despite this knowledge."[112] The trial court granted the employer's motion to strike the employee's jury

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volved in the case would fall within the gambit of seventh amendment protection; the court cited no authority in support of this proposition. *Id.* at 685.

104. *Bertolino*, No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file).

105. *Id.*

106. 15 Ohio St. 3d 90, 95, 472 N.E.2d 1046, 1051 (1984) (defining 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").

107. *Bertolino*, No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file). The court in *Bertolino* clearly erred in using the *Jones'* definition as the baseline because section 4121.80(G) raises the level of intent necessary to have an intentional tort to "deliberate intent," far above the *Jones* standard. *See infra* text accompanying notes 158-68. Moreover, the *Bertolino* court produced no authority to buttress its conclusion that section 4121.80(D) created a new cause of action unknown at common law. No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file); *accord* Brady v. Safety-Kleen Corp., 710 F.Supp. 684 (S.D. Ohio 1989); Kowal v. Ohio Poly Corp., 34 Ohio Misc. 2d 22, 518 N.E.2d 61 (1987).

108. No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file). Interestingly, a jury served in an advisory capacity to prevent a re-trial should section 4121.80 be held unconstitutional by the Ohio Supreme Court. *Id.*

109. *See* cases cited *supra* note 16.

110. No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file).

111. *Id.*

demand on the basis of Ohio Revised Code section 4121.80(D).[113] The employer moved for judgment on the pleadings and argued that the employee failed to state a claim upon which relief could be granted based on the immunity provided by the workers' compensation statute.[114] The trial court subsequently granted the employer's motion.[115] On appeal, the employee contended that Ohio Revised Code section 4121.80 is unconstitutional "because it denies a party suing his employer in intentional tort the right to a trial by jury."[116] The court of appeals found the employee's contention to be well taken.[117]

The court of appeals in *Palcich* held that Ohio Revised Code section 4121.80(D) is unconstitutional because denial of a jury trial in intentional tort cases violates article I, section 5 of the Ohio Constitution.[118] The court of appeals described the right to a jury trial as an 'ancient one,' recognized and guaranteed in the Magna Carta, and also guaranteed by article I, section 5 of the Ohio Constitution for those cases where the right existed prior to the adoption of the Ohio Constitution.[119] Essentially, the court of appeals in *Palcich* framed the issue in the same manner as the district court in *Bertolino*: If the right to a jury trial for an intentional tort existed at common law prior to the adoption of the Ohio Constitution, then article I, section 5 forbids the legislature from abridging that right.[120] The court of appeals in *Palcich* believed that the action did exist at common law, but failed to fully address the *Bertolino* court's concern with the definition of an intentional tort as set forth in *Jones* and whether this definition created a new cause of action.[121]

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113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

119. The jury in civil cases has its origin in the Assizes of Clarendon, A.D. 1166, and of Northampton, A.D. 1176, which created the Grand and Petty Assizes. R. WALKER, THE ENGLISH LEGAL SYSTEM 30 (1985) (discussing period when virtually all actions at common law in contract and tort were tried to a jury). The jury was originally a body of local witnesses, and later became the trier of fact. *Id.*; *see also* P. DEVLIN, TRIAL BY JURY 7 (1966); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 147-48 (1903); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 642, 649 (2d ed. 1898) (by 1352 the seeds of the present bifurcated system of grand and petit jury were sown). For an excellent treatise on the common law trial by jury and the Magna Carta, see generally, L. SPOONER, AN ESSAY ON THE TRIAL BY JURY (1852).

120. *Bertilino*, No. C85-156A (N.D. Ohio Apr 5, 1987) (LEXIS, Genfed library, Dist file). *Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file).

121. *Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file); *see also Bertilino*, No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file); *Jones*, 15 Ohio St. 3d at 91, 472 N.E.2d at 1047 (defining an intentional tort as an act committed with intent to injure another, or committed with the belief that such injury is substantially certain to occur; specific intent to injure unnecessary to a finding of intentional misconduct).

This omission on the part of the court of appeals in *Palcich* may be explained as a difference in focus. There are at least two distinct levels at which a court might address the issue of whether an intentional tort as defined in *Jones* existed at common law. The first approach is to narrowly focus upon the specific language of the definition set out by the Ohio Supreme Court in *Jones*, and to ask whether that exact language described an intentional tort at common law.[122] The second approach is to overlook the specific language set out in the *Jones* decision, and to ask whether the underlying cause of action, or species of action, existed at common law.[123] Under either approach, if the intentional tort, however defined, is found to have existed at common law, then the court should ask whether the right to a jury trial in an intentional tort action existed at common law prior to the adoption of the Ohio Constitution in 1802.[124]

The court of appeals in *Palcich* reasoned that the modern intentional tort of battery derives from the common law action of trespass, and that the common law recognized a right to trial by jury for the action known as trespass for battery.[125] The court dismissed the addition of the "substantial certainty" language of *Jones* because the *Palcich* court believed such language did not negate "the common law origin of the tort."[126] Furthermore, the *Palcich* court characterized the intentional tort claim as a claim with "strong and legible common law roots in the intentional torts phylum,"[127] and stated that there was "a constitutional mandate for a jury trial in this specie of case."[128] This position exemplifies the difference in the focus of the *Palcich* and *Bertolino* courts because of the *Bertolino* court's preoccupation with

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122. *See Bertolino*, No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file).

123. *See Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file).

124. *Id.* If, under either approach, the intentional tort is found not to have existed at common law, there is no right to a jury trial. Additionally, it is important to note that only one court has narrowly focused upon the specific language. *Bertolino*, No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file).

125. *Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file); *see also* R. WALKER, *supra* note 119, at 24. "Trespass was the remedy for all forcible, direct and immediate injuries, whether to person or property . . . ." W. PROSSER & W. KEETON, *supra* note 12, § 6, at 29. Trespass for battery was an "action for bodily harm directly resulting from an act done" with the intent to bring about a harmful or offensive contact to another. RESTATEMENT (SECOND) OF TORTS § 13 comment a (1965).

126. *Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file); *see also Jones*, 15 Ohio St. 3d at 91, 472 N.E.2d at 1047.

127. *Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file).

the specific definitional characteristics of the *Jones* substantial certainty language and not the underlying cause of action.[129]

Several Ohio courts which subsequently addressed the issue of the constitutionality of Ohio Revised Code section 4121.80 have adopted the reasoning of the *Palcich* court.[130] In *Bishop v. Hybud Equipment Corp.*,[131] the Summit County Court of Appeals held that Ohio Revised Code section 4121.80 could be interpreted as violative of article I, section 5 of the Ohio Constitution, because "the right to a jury trial existed at common law for any action of an intentional nature."[132] The *Bishop* court adopted the focus of the *Palcich* court by suggesting that the "recent expansion of the concept of intentional tort, to include those acts which a person is substantially certain will cause harm, does not negate the common law origin of the tort."[133]

The *Bishop* court approached its result from a novel direction. The court reasoned that it was bound, if possible, to give legislative acts a constitutional construction.[134] It did so by holding that the language of section 4121.80 was ambiguous,[135] that it did not eliminate jury trials,[136] and it was, therefore, constitutional.[137]

This approach was subsequently contravened by the Ohio Supreme Court in *Kneisley v. Lattimer-Stevens Co.*[138] The Ohio Supreme Court held that when the legislature used the word "court" in section 4121.80(D), the legislature did not intend to include within its meaning

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129. *Bertolino*, No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Ohio file).

130. *See* Seth v. Capitol Paper Co., No. 11539 (Ohio Ct. App. Aug. 29, 1990) (LEXIS, States library, Ohio file); Ulman v. Clyde Super Valu, No. S-88-48 (Ohio Ct. App. Sept. 22, 1989) (LEXIS, States library, Ohio file); Schneider v. Jefferson Smurfit Corp., 42 Ohio App. 3d 53, 55, 536 N.E.2d 691, 693 (1988); Howard v. Ravenna Auto Parts, Inc., No. 1835 (Ohio Ct. App. July 29, 1988) (LEXIS, States library, Ohio file).

131. 42 Ohio App. 3d 55, 536 N.E.2d 694 (1988).

132. *Id.* at 58, 536 N.E.2d at 697.

133. *Id.*

134. *Id.*

135. The court of appeals in *Bishop* was concerned that section 4121.80 included language at subsection (C)(2) that directs the court to dismiss the action upon a motion for directed verdict if certain criteria are met. *Id.* at 57, 536 N.E.2d at 696-97. The *Bishop* court believed that this language rendered the statute ambiguous as to whether the word "court" meant a judge with a jury or without a jury, because a directed verdict is a concept that the court believed applied exclusively in a jury trial situation. *Id.* at 58, 536 N.E.2d at 696-97. Thus, the court reasoned that the ambiguity made it unclear as to whether the statute abolished the right to a jury trial and held that it did not. *Id.* at 59, 536 N.E.2d at 698. However, this seems a rather disingenuous way to approach the question of the constitutionality of section 4121.80 given the almost overwhelming clarity of the intent of the legislature to remove intentional tort claims from the hands of the jury.

136. *Id.* at 59, 536 N.E.2d at 698.

137. *Id.*

138. 40 Ohio St. 3d 334, 533 N.E.2d 743 (1988).

a jury.[139] The Ohio Supreme Court in *Kneisley*, however, left the question as to the constitutionality of Ohio Revised Code section 4121.80(D) unsettled because it did not directly rule on the issue.[140]

Each court which has subsequently addressed the issue of the constitutionality of Ohio Revised Code section 4121.80(D) has framed the issue in essentially the same manner as the foregoing courts.[141] In *Ulman v. Clyde Super Value*,[142] the court presented the issue in this way: "Since there is no legislatively created right to a jury under R.C. 4121.80(D), the only remaining question is whether a right to a jury existed at common law prior to the adoption of the Constitution of Ohio, for intentional torts committed by an employer."[143] The court recognized that article I, section 5 of the Ohio Constitution contains a guarantee of a right to a jury trial.[144] The court indicated that the constitutional guarantee of a right to a jury trial is limited, by long-standing precedent, to those causes of action which have a statutorily conferred right to a jury trial or were traditionally recognized as having a right to jury trial prior to the adoption of the Ohio Constitution in 1802. The court found that, indeed, a jury trial right existed at common law prior to the adoption of the Ohio Constitution for injuries intentionally inflicted by employers on employees.[145] Therefore, the *Ulman* court found that section 4121.80(D) was unconstitutional.

The most recent court to address the issue of the constitutionality of section 4121.80(D) was the Montgomery County Court of Appeals in *Seth v. Capitol Paper Co.*[146] The *Seth* court stated:

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139. *Id.* at 357, 533 N.E.2d at 745. The Ohio Supreme Court in *Kneisley* stated: "Upon review, we reject the suggestion that the term 'court' encompasses the jury so as to preserve the latter's role, and find that R.C. 4121.80(D) destroys the right altogether." *Id.* It has been suggested that in so holding the court implicitly upheld the constitutionality of section 4121.80, however, this is doubtful since the court's above language appears to be a mere recognition of what the language of section 4121.80(D) seems to accomplish and not a holding as to its constitutionality. In any event, courts which have addressed the issue as late as August of 1990 continue to hold section 4121.80 unconstitutional because it abolishes trial by jury, and, thus, the issue remains unsettled. *See* Seth v. Capitol Paper Co., No. 11539 (Ohio Ct. App. Aug. 29, 1990) (LEXIS, States library, Ohio file).

140. 40 Ohio St. 3d at 354, 533 N.E.2d at 743.

141. *Compare Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file) *and* Seth v. Capitol Paper Co., No. 11539 (Ohio Ct. App. Aug. 29, 1990) (LEXIS, States library, Ohio file) *and* Ulman v. Clyde Super Valu, No. S-88-48 (Ohio Ct. App. Sept. 22, 1989) (LEXIS, States library, Ohio file) *and* Schneider v. Jefferson Smurfit Corp., 42 Ohio App. 3d 53, 55, 536 N.E.2d 691, 693 (1988) *and* Howard v. Ravenna Auto Parts, Inc., No. 1835 (Ohio Ct. App. July 29, 1988) (LEXIS, States library, Ohio file).

142. No. S-88-48 (Ohio Ct. App. Sept. 22, 1989) (LEXIS, States library, Ohio file).

143. *Id.*

144. *Id.*

145. *Id.*

146. No. 11539 (Ohio Ct. App. Aug. 9, 1990) (LEXIS, States library, Ohio file).

> The question for resolution is whether R.C. 4121.80 is unconstitutional because it destroys the right of trial by jury on all issues of material fact, including questions of liability and damages. We, as have other courts of appeals, conclude that R.C. 4121.80 is unconstitutional insofar as its provisions impair an employee's constitutional right to a jury trial.[147]

The *Seth* court followed the reasoning and focus of the Geauga County Court of Appeals in *Palcich* and stated: "[w]here the modern action arises from a cause rooted in the common law, the right to a jury trial extends to all factual issues including assessment of damages."[148] Thus, nearly every court faced with determining the constitutionality of section 4121.80(D) has stated the issue in essentially the same manner.[149] However, the focus alternates between a narrow reading of the "substantial certainty" language of *Jones*, and a sweeping historical analysis of the evolution of an intentional tort action.[150] This comment will now address the first of two threshold questions in determining the constitutionality of Ohio Revised Code section 4121.80(D) raised by the foregoing court decisions. The first is whether the right of an employee to bring an action for intentional tort against her employer existed at common law prior to the adoption of the Ohio Constitution in 1802.

B. The Definition of Intentional Tort at Common Law

The first threshold question to be resolved is whether the right of an employee to bring an action for an intentional tort against her employer existed at common law prior to the adoption of the Ohio Constitution in 1802.[151] The present-day concept of an intentional tort evolved from the common law action of trespass. In early actions at English common law, an action in trespass would lie for all direct harms and an "action on the case" would lie for indirect harms.[152] In

147. *Id.* The *Seth* court was the first to expand the question of the constitutionality of section 4121.80(D) from the issue of liability to the issue of damages. *Id.*

148. *Id.*

149. *See* Seth v. Capitol Paper Co., No. 11539 (Ohio Ct. App. Aug. 29, 1990) (LEXIS, States library, Ohio file); Ulman v. Clyde Super Valu, No. S-88-48 (Ohio Ct. App. Sept. 22, 1989) (LEXIS, States library, Ohio file); Schneider v. Jefferson Smurfit Corp., 42 Ohio App. 3d 53, 55, 536 N.E.2d 691, 693 (1988); Howard v. Ravenna Auto Parts, Inc., No. 1835 (Ohio Ct. App. July 29, 1988) (LEXIS, States library, Ohio file); *Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file).

150. *Compare Bertolino*, No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file) *with Palcich*, No. 1394 (Ohio Ct. App. Dec 24, 1987) (LEXIS, States library, Ohio file).

151. *See* cases cited *supra* note 16.

152. *Kneisley*, 40 Ohio St. 3d at 356, 533 N.E.2d at 746; *Palcich*, No. 1394 (Ohio Ct. App. Dec 24, 1987) (LEXIS, States library, Ohio file); W. PROSSER & W. KEETON, *supra* note 12, § 6, at 29. Trespass was the remedy for all forcible, direct and immediate injuries, whether to person

the early nineteenth century, courts began to abandon the artificial distinction between direct and indirect injury, and instead looked to the intent of the wrongdoer, or to his negligence.[153] Causes of action on the case were expanded to include negligently inflicted injury "although trespass remained as the remedy for the greater number of intentional wrongs. Terms such as battery, assault and false imprisonment, which were varieties of trespass, came to be associated with intent, and negligence emerged as a separate tort."[154] Thus, the modern intentional tort of battery derived from the common law form of action known as trespass for battery, which was available where an offending party "act[ed] intending to cause a harmful or offensive contact with the person of the other or a third person."[155] "At the beginning of the nineteenth century, the forms of action, including trespass and case, still existed . . . as the core of common law procedure."[156] The Ohio Supreme Court has recognized the fact that an action in intentional tort by an employee against his employer was available at common law, at least until the 1923 constitutional amendment.[157] Hence, it seems clear that such an action was available at common law prior to the adoption of the Ohio Constitution.

An important issue is whether, as some courts have suggested, the definition of an intentional tort as articulated by the Ohio Supreme Court in *Jones*,[158] changed the nature of intent recognized at common law prior to 1802.[159] Whether this has any bearing on determining the

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or property . . . ." *Id.*; R. WALKER, *supra* note 119, at 35. "Until the fourteenth century trespass constituted the whole of the existing law of torts with the exception of detinue . . . ." *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 13 comment a (1965).

153. W. PROSSER & W. KEETON, *supra* note 12, § 6, at 30.

154. *Id.*

155. RESTATEMENT (SECOND) OF TORTS § 13(a) (1965).

156. W. PROSSER & W. KEETON, *supra* note 12, § 6, at 31.

157. Van Fossen v. Babock & Wilcox Co., 36 Ohio St. 3d 100, 111, 522 N.E.2d 489, 499 (1988). The Ohio Supreme Court in *Van Fossen* stated that historically, the only recovery available to an employee against her employer was at common law. *Id.* Moreover, the court recounted the terms of the original 1911 workers' compensation statute which allowed a worker the option to sue at common law for injury which resulted from a "willful act" committed by the employer. *Id.* at 110, 522 N.E.2d at 498-99. The term "willful act" was defined by the legislature in 1914 to mean "an act done 'knowingly and purposely with the direct object of injuring another.' " *Id.* at 110, 522 N.E.2d at 499 (quoting 1914 Ohio Laws 1940). This definition of "willful act" is essentially the same as section 4121.80(G)'s definition of "substantial certainty." OHIO REV. CODE ANN. § 4121.80(G) (Baldwin 1990). The "willful act" exception was, in 1934, held to be repealed by implication with the passage of the 1923 constitutional amendment. *See supra* text accompanying note 52.

158. 15 Ohio St. 3d at 90, 472 N.E.2d at 1046.

159. Concerning this, the district court in *Brady v. Saftey-Kleen Corp.*, stated:

> The cause of action in intentional tort against an employer, first recognized in Blankenship v. Cincinnati Milacron Chemicals, 69 Ohio St. 2d 608, 433 N.W.2d 572 (1982) and Jones v. VIP Development Co., 15 Ohio St. 3d 90, 472 N.E. 1046 (1984) *and later incor-*

constitutionality of section 4121.80 must also be resolved. These determinations are important to the analysis because the major premise of the courts which have held Ohio Revised Code section 4121.80(D) to be constitutional is that the *Jones* court's definition of an intentional tort altered the traditional common law definition, thus creating a tort unknown at common law.[160]

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porated into [R.C.] § 4121.80, did not predate the adoption of the Ohio Constitution, and therefore § 4121.80(D) does not run afoul of the Ohio Constitution.

Brady, 710 F. Supp. at 685 (emphasis added).

Furthermore, the District Court in *Bertolino* stated:

> The Court concludes that a plaintiff's common law right to sue his employer for an intentional tort, as that concept has been defined in Jones v. VIP, *supra*, is a common law right which did not exist until the decision of the Supreme Court of Ohio in the *Blankenship* case.
>
> . . . .
>
> The extremely broad definition of intentional tort enunciated in the *Jones* case . . . created a new cause of action . . . . For the foregoing reasons the Court concludes that . . . Ohio Revised Code § 4121.80 does not violate Article I, § 5 of the Constitution of the State of Ohio.

No. C85-156A (N.D. Ohio Apr. 5, 1987) (LEXIS, Genfed library, Dist file).

160. *See, e.g., Brady*, 710 F. Supp. at 684; *Bertolino*, No. C85-156A (N.D. Ohio Apr 5, 1987) (LEXIS, Genfed library, Dist file). The focus of these courts was on the exact language of the *Jones*' definition of an intentional tort, as opposed to the underlying class of cases to which the cause of action belonged. These courts then determined that the *Jones'* definition of an intentional tort was unknown at common law prior to 1802, and, therefore, the legislature could abolish the right to a jury trial in those types of cases. In a narrow sense these courts are correct that the "substantial certainty" language of *Jones* was probably not used as a term of art at early common law. However, the notion of constructive, or imputed intent was recognized in actions of trespass prior to 1802, and the "substantial certainty" language, or its equivalent, appears as a term of art denoting imputed or constructive intent as early as the 1880's. *See* Scott v. Shepherd, 96 Eng. Rep. 525 (1773); Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891); *see also* T. COOLEY, A TREATISE ON THE LAW OF TORTS 189 (2nd ed. 1888) (analysis of Scott v. Shepherd); Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1895). Justice Holmes stated "the intentional infliction of temporal damage, or *the doing of an act manifestly likely to inflict such damage* and inflicting it, is actionable if done without just cause." *Id.* (emphasis added). Thus, even if the *Jones*' definition were controlling as to the traditional common law definition, a good argument can be made that the idea behind "substantial certainty," (i.e., no specific intent to injure is needed where the actor proceeds despite a perceived threat of harm to others which is substantially certain, not merely likely to occur), was present at common law even if the exact language was not. The movement from abstract notions of inferred or constructive intent to a term of art such as "substantial certainty" must be viewed as an evolutionary process which occurred over many years in response to the non-verifiable issues the question of an actor's intent inevitably threatened to pose: it is simply the natural movement, and ultimately the embodiment in language of art, within the same tort from a subjective to an objective standard. *See* Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 918-19 (1982).

As Austin, in the late nineteenth century, stated so eloquently:

> You shoot at Sempronius or Styles, at Titus or Nokes, desiring and intending to kill him. The death of Styles is the end of your volition and act. Your desire of his death, is the *ultimate motive* to the volition. You contemplate his death, as the probable consequence of the act.
>
> But when you shoot at Styles, I am talking with him, and am standing close by him. And from the position in which I stand with regard to the person you aim at, you think it

The interpretation that section 4121.80 incorporated the *Jones* definition of an intentional tort is incorrect. The Ohio Supreme Court in *Jones* 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,"[161] and further held that "*specific intent to injure is [un]necessary to a finding of intentional misconduct.*"[162] Ohio Revised Code section 4121.80(G)(1) defines an intentional tort as "an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur."[163] However, at Ohio Revised Code section 4121.80(G)(1), paragraph 3, the statute defines "substantially certain" as acting with "deliberate intent."[164] This definition of "substantially certain" is entirely different from that which the Ohio Supreme Court set forth in *Jones*. "[D]eliberate intent" is synonymous with "specific intent," but the Ohio Supreme Court in *Jones* abrogated the need for "specific intent" as a basis for liability in intentional tort.[165] Thus, the common law definition of intent must be viewed through the prism of the language of the statute,[166] and not the Ohio Supreme Court's *Jones* decision. The statutory language has superseded and altered the Ohio Supreme Court's prior definition of an intentional tort as articulated in *Jones*.[167] It is evident that Ohio Revised Code section 4121.80(G)(1) calls for a level of intent much

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> not unlikely that you may kill *me* in your attempt to kill *him*. You fire and kill me accordingly. Now here you *intend* my death without *desiring* it. The end of the volition and act, is the death of Styles. *My* death is neither desired as an end, nor is it desired: *My* death *subserves not* your end: you are not a bit nearer to the death of Styles by killing *me*. But, since you contemplate my death as a probable consequence of your act, you *intend* my death although you *desire* it not.

Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L. J. 645, 654-55 (1916-1917) (quoting I. AUSTIN, JURISPRUDENCE 424 (5th ed. 1910)).

161. *Jones*, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051.

162. *Id.* (emphasis added).

163. OHIO REV. CODE ANN. § 4121.80(G)(1) (Baldwin 1990).

164. *Id.*

165. *Jones*, 15 Ohio St. 3d at 96, 472 N.E.2d at 1051; *cf.* Van Fossen v. Babcock & Wilcox Co., 36 Ohio St. 3d 100, 108-109, 522 N.E.2d 489, 497-98 (1988) (section 4121.80(G)(1) "impos[es] a new, more difficult" burden upon plaintiff to show employer acted with "deliberate intent"). Petrie states: "[g]iven the *Jones* distinction between specific intent and inferred intent based upon substantial certainty, one interpretation of *Van Fossen* is to say that the court believes that the statutory standard of deliberate intent is tantamount to the specific intent standard." B. PETRIE, *supra* note 1, § 6.10, at 44. *See generally*, Note, *Ohio's Attempt to Circumvent the Concept of an Intentional Tort—Enactment of Revised Code Section 4121.80*, 16 CAP. U.L. REV. 279, 295-96 (1986).

166. "The apparent legislative purpose behind the use of the term 'deliberate' was to narrow the definition of intent to mean specific intent: *i.e.*, a purposeful act by the employer with a desire to bring about the consequences of the act." B. PETRIE, *supra* note 1, § 3.32, at 16.

167. *Id.*

higher than that called for by the Ohio Supreme Court in *Jones*.[168] The relevant question to pose in order to determine the constitutionality of the abolition of a jury trial in an intentional tort action under Ohio Revised Code section 4121.80 is: Did the language of section 4121.80, itself, alter in any way the traditional common law test for the requisite intent necessary to bring an action for intentional tort prior to 1802?

Clearly, a cause of action in trespass would lie for an injury deliberately inflicted by one person upon another.[169] Deliberate injury is at the very heart of an "intentional tort" and is perhaps its most fundamental definition.[170] Moreover, this did not change at common law simply because the relationship between the actors was that of employer-employee.[171] Thus, the threshold question is whether an employee had a right to bring an action for an intentional tort against his employer at common law prior to the adoption of the Ohio Constitution in 1802. This question must be answered in the affirmative. This is certainly the case if an intentional tort is defined as a deliberate act intended to injure the employee as set forth in section 4121.80(G)(1).[172] This comment will now analyze the final threshold question raised by the courts which have addressed the issue of the constitutionality of Ohio Revised Code section 4121.80(D). This question is did the right to a jury trial exist in the above-described type of action at common law prior to 1802?

C. The Right to a Jury Trial at Common Law in an Action for Deliberate Infliction of Personal Injury Prior to 1802

This comment contends that the act, which Ohio Revised Code section 4121.80(G)(1) describes as an "intentional tort," existed at common law prior to 1802. Therefore, the constitutionality of section 4121.80(D) "turns upon the answer to one question: [I]s this the type of civil case which . . . carried with it a right to jury trial before the

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168. Note, *supra* note 165, at 295-96.

169. *See, e.g.*, RESTATEMENT OF TORTS SECOND § 13 comment a (1965); W. PROSSER & W. KEETON, *supra* note 12, § 8, at 35.

170. *See generally* sources cited, *supra* note 160 (intent extends under all circumstances to those consequences which are desired).

171. Employees could bring an action against their employers at common law for intentional, deliberately inflicted injury, and still may under almost all workers' compensation statutes. 2A A. LARSON, *supra* note 1, § 68. In fact, section 4121.80 with its "deliberate intent" definition of intentional tort, "has brought Ohio full-circle back to the 1914 amendment to the Ohio Worker's Compensation Act which allowed employee suits in cases involving a 'willful act' and defined 'willful act' as: an act done knowingly and purposefully, with the direct object of injuring another." B. PETRIE, *supra* note 1, § 3.32, at 17.

172. *But see Jones*, 15 Ohio St. 3d at 96, 472 N.E.2d at 1051 (for the more expansive "substantial certainty" definition of intentional tort).

Ohio Constitution was adopted?"[173]

Article I, section 5 of the 1851 Ohio Constitution preserves the right to a jury trial in those cases to which the right applied at the time of the adoption of the original 1802 Ohio Constitution.[174] When the 1802 Ohio Constitution was adopted, questions in actions at law were tried to a jury, while questions in actions of equity were not.[175] "Thus, this section preserves the right to a jury in traditional actions at law . . . but not in equity."[176] When pleading and procedure were reformed in the mid-nineteenth century, law and equity merged, and the state constitutional right to a jury trial came to depend on the previous form of the action.[177] Moreover, all actions at law which called for a jury trial as of right were either suits for "money only, or for the recovery of specific real or personal property."[178] In fact, Ohio Revised Code section 2311.04 provides a statutory right to a jury trial on all actions for the recovery of money only.[179] This section was originally adopted in the mid-nineteenth century "to allay confusion which would inevitably result from trying to decide whether a mixed law and equity case carried the right to a jury or not."[180] Prosser and Keeton state that "[t]he civil action for tort . . . is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered . . . . If successful, the plaintiff receives a judgment for a sum of money."[181] There can be little doubt that trespass for battery, the progenitor of the modern intentional tort, was an action solely for monetary recovery.

Furthermore, the right to a jury trial attached in " 'the common-law actions of . . . trespass . . . and consequently, in all civil actions under modern practice which formerly would have fallen within some one of these common-law forms of action.' "[182] At English common law, the right to a jury trial existed for actions in trespass.[183] In fact, Professor Walker states that because "all writs of trespass and actions

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173. *Bertolino*, No. C85-156A (N.D. Ohio Apr 5, 1987) (LEXIS, Genfed library, Dist file).

174. OHIO CONST. art. I, § 5; *see* Belding v. State *ex rel.* Heifner, 121 Ohio St. 393, 169 N.E. 301 (1929). *See generally*, James, *Right to a Jury Trial in Civil Actions*, 72 YALE L. J. 655 (1963).

175. OHIO CONST. art. I, § 5, Editor's Comment (Baldwin 1990).

176. *Id.*

177. 1 J. KLEIN, J. BROWNE & J. MURTAUGH, BALDWIN'S OHIO CIVIL PRACTICE § T 27.06, at 366 (1988) [hereinafter J. KLEIN].

178. *Id.*

179. OHIO REV. CODE ANN. § 2311.04 (Baldwin 1990).

180. 1 J. KLEIN, *supra* note 177, § T 27.06, at 367.

181. W. PROSSER & W. KEETON, *supra* note 12, § 2, at 7.

182. Bishop v. Hybud Equipment Co., 42 Ohio App. 3d 55, 58, 536 N.E.2d 694, 697 (1988) (quoting 47 AM JUR. 2D *Jury* § 39 (1969)).

183. R. WALKER, *supra* note 179, at 24.

on the case were triable by jury, the effect was that, at common law, virtually all actions in contract and tort were tried by a jury."[184] Early Ohio case law also supports the conclusion that actions for personal injury carried with them a right to a jury trial at common law prior to the adoption of the Ohio Constitution of 1802.[185] Finally, the Ohio Supreme Court and several appellate courts have recently recognized that "'the right to a jury trial in trespass actions existed in this state at common law, and now extends to its progeny . . . intentional tort actions."[186]

Thus, it appears certain that the right to a jury trial in a civil action of the kind authorized by Ohio Revised Code section 4121.80 existed at common law. The result is that the legislature has acted unconstitutionally in abolishing the right to a jury trial in Ohio Revised Code section 4121.80(D). A party to an intentional tort action under Ohio Revised Code section 4121.80 has a right to have a jury determine liability and damages, which are issues of material fact.[187] Because these rights existed at common law, prior to the adoption of the Ohio Constitution, they remain inviolate and cannot be extinguished by statute. In consideration of the foregoing, the Ohio Supreme Court should hold Ohio Revised Code section 4121.80(D) unconstitutional as clearly violative of article I, section 5 of the Ohio Constitution.

D. Recommendations

The legislature attempted to address the fundamental problem of expanded employer liability with Ohio Revised Code section 4121.80. If section 4121.80(G) were to be interpreted and applied exactly as the

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184. *Id.* at 30.

185. State *ex rel.* Pond v. Fassig, 18 Ohio N.P. (n.s.) 177, 180 (1915) *rev'd on other grounds*, 5 Ohio App. 479 (1916).

186. *Kneisley*, 40 Ohio St. 3d at 357, 533 N.E.2d at 746; *see also Seth*, No. 11539 (Ohio Ct. App. Aug. 9, 1990) (LEXIS, States library, Ohio file); *Ulman*, No. S-88-48 (Ohio Ct. App. Sept. 22, 1989) (LEXIS, States library, Ohio file); *Palcich*, No. 1394 (Ohio Ct. App. Dec. 24, 1987) (LEXIS, States library, Ohio file).

187. *Seth*, No. 11539 (Ohio Ct. App. Aug. 9, 1990) (LEXIS, States library, Ohio file). In a typical negligence action under the Ohio Workers' Compensation Act, Ohio Revised Code section 4123.519 establishes that a jury may be demanded. OHIO REV. CODE ANN. § 4123.519 (Baldwin 1990). However, where the question involves only the construction of the applicable law, the question is for the court. Industrial Comm'n v. Roth, 98 Ohio St. 34, 37, 120 N.E. 172, 173 (1918). On the other hand, if reasonable minds might differ as to the inferences to be drawn from the evidence, the case is for the jury. Pence v. Kettering, 128 Ohio St. 52, 55, 190 N.E. 216, 217 (1934). Jury questions in workers' compensation actions include the accidental character of the injury, whether the injury was sustained in the course of employment, and the causal relationship between injury and disability, and between injury and death. Industrial Comm'n v. Cherry, 115 Ohio St. 700, 155 N.E. 865 (1926). Thus, the jury plays its traditional and constitutionally mandated role within the workers' compensation scheme, and should be within Ohio Revised Code § 4121.80 especially since an intentional tort is ostensibly tried outside of the immunity of the Act.

legislature intended, then the problem would be partially addressed without sacrificing a worker's right to a jury trial in an intentional tort action.[188]

Deliberate injury should mean just that, deliberate. As Professor Larson stated, the intent required must be nothing less than "deliberate infliction of harm comparable to an intentional left jab to the chin."[189] Any allegation which falls short of the statutory standard of deliberate conduct set out in Ohio Revised Code section 4121.80(G) should be immediately dismissed by the trial court upon a motion to dismiss for failure to state a claim, or upon a motion for summary judgment.[190] If an employer injures a worker in this manner, she has no right to hide behind the exclusivity of the Workers' Compensation Act. The matter should proceed at common law in the traditional manner, with a jury determining liability and damages.[191] If the employee is injured in a manner short of deliberately inflicted injury, then the bargained-for immunity of the Workers' Compensation Act protects the employer. The employer will not have to answer at common law and is relieved of the prospect of unexpectedly large damage verdicts.[192] For this, the employee is protected with guaranteed, swift, and adequate compensation.[193] This approach is fair, constitutional, and can be spelled out in clear and unambiguous terms by the Ohio Supreme Court. Deliberate must mean deliberate intent to injure.

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188. Larson recounts the many creative ways in which courts have attempted, and often succeeded, in getting around the necessity of 'actual and deliberate intent to bring about injury.' 2A A. LARSON, supra note 12, § 68, at 13-1 to 13-205. However, in spite of the room for judicial interpretation, Prosser and Keeton state "[t]he vast majority of courts have held that conduct that falls short of an intent to injure will not permit an employee to overcome the exclusivity requirement." W. PROSSER & W. KEETON, *supra* note 12, § 80, at 576.

189. 2A. A. LARSON, *supra* note 12, § 68.13, at 13-45. The language of Ohio Revised Code section 4121.80(G) is clear and unambiguous to one who does not become unnecessarily distracted by the "substantial certainty" mantra of *Jones*, 15 Ohio St. 3d at 90, 472 N.E.2d at 1046. The statute clearly calls for "deliberate intent" in order for an intentional tort action to lie. OHIO REV. CODE ANN. § 4121.80(G) (Baldwin 1990). The intent necessary is greater than "substantial certainty." Van Fossen v. Babcock & Wilcox Co., 36 Ohio St. 3d 100, 110, 522 N.E.2d 489, 498 (1988). This probably means "an actual and deliberate intent to bring about injury" since this is the requirement of a clear majority of states. 2A A. LARSON, *supra* note 12, § 68, at 13-1, 13-10; *see also* Keating v. Shell Chemical Co., 610 F.2d 328 (5th Cir. 1980) (nothing short of intent to bring about the event which occurred will bar exemption from tort liability under Louisiana workers' compensation statute); Mize v. Conagra Inc., 734 S.W.2d 334 (Tenn. App. 1987) (gross, criminal negligence not equated with intent to injure under workers' compensation statute).

190. Larson states, "A complaint, to survive a motion to dismiss, must do more than merely allege intentional injury as an exception to the general exclusiveness rule; it must allege *facts* that add up to a deliberate intent to bring about injury." 2A A. LARSON, *supra* note 12, § 68.14, 13-46.

191. *Seth*, No. 11539 (Ohio Ct. App. Aug. 9, 1990) (LEXIS, States library, Ohio file).

192. 2A A. LARSON, *supra* note 1, § 68.13 at 13-45.

193. See, e.g., [illegible] 16/iss2/11.

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employers standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or . . . other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.[194]

If this type of clear standard is set, then employers could again rest secure in the knowledge that for any accidental injury they would be safe within the confines of the Workers' Compensation Act and immune from civil action. Employees would be assured of a common law cause of action when the facts alleged show that an employer acted with "deliberate intent directed to the purpose of inflicting injury."[195] Only in this manner may the promise of workers' compensation be fulfilled by Ohio Revised Code section 4121.80 without an egregious intrusion on a constitutional right.

IV. CONCLUSION

Workers' compensation is a good system for a complex, industrial society, but the constitutional right to a jury trial in an intentional tort action cannot be infringed upon merely because the legislature wishes to protect employers from the uncertainties of a jury trial. Certainly, the cost to the employer is potentially high when a jury is involved in determining liability and damages, but the cost to society in losing such a fundamental right is much higher. There is no clear evidence that workers bargained away their right to sue an employer at common law for an intentional, deliberate tort, as they did for accidental injuries. It would be manifestly unfair and inaccurate to interpret the history of workers' compensation to assert that the employees did.[196] In any event, Ohio Revised Code section 4121.80 carves out an exception to the exclusivity of the Workers' Compensation Act allowing an employee to sue at common law for a deliberately inflicted intentional tort but does not allow a jury trial.[197] Under these circumstances, there is no reasonable alternative but for the Ohio Supreme Court to declare the legislature's abolition of the right to trial by jury in an intentional tort action unconstitutional because is violative of article I, section 5 of the Ohio Constitution.

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194. 2A A. LARSON, *supra* note 12, § 68.13, at 13-10 (footnote omitted).

195. *Id.*

196. Van Fossen v. Babcock & Wilcox, 36 Ohio St. 3d 100, 111-12, 522 N.E.2d 489, 500 (1988).

197. OHIO REV. CODE ANN. § 4121.80(D) (Baldwin 1990).

The evidence of the constitutional infirmity of Ohio Revised Code section 4121.80(D) is overwhelming. The modern intentional tort action is the direct progeny of trespass for battery. Furthermore, a jury trial was available to the parties, as of right, in an action for trespass for battery at common law prior to 1802. For these reasons, Ohio Revised Code section 4121.80(D) is manifestly unconstitutional, and should be promptly declared so.

Randal S. Knight