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INTRODUCTION

The close of the Industrial Revolution which engulfed this county during the nineteenth century was marked by a significant increase in the number of industrial injuries.[1] Spurred by a growing public concern for the safety and well-being of the laborer, numerous state legislatures across the country responded by passing workmen's compensation legislation.[2] Typical of this humanitarian legislation is the Indiana Workmen's Compensation Act of 1929, which was designed to relieve injured employees of the financial burden of medical expenses and loss of wages resulting from work-related injuries.[3] Prior to the passage of this Act, the Indiana employee who was injured on the job as the result of his employer's negligence could seek redress only from the courts, usually on the theory of common law tort liability.[4] Invariably an employee's chances for recovery were dependent upon his ability to prove the negligence of the employer. Even if such fault could be shown, the employer often times avoided liability by asserting the affirmative defenses of contributory negligence and assumption of risk.[5] If it was shown that the employee had to any degree assumed the risk or contributed to the injury, the employee's cause of action failed.[6] Without other recourse, the employee who had suffered a disabling injury or incurred massive medical expenses was, along with his family, confronted with dire economic circumstances.[7]

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1. *See generally* 58 AM. JUR. *Workmen's Compensation* § 2 (1948); 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 4 (1978) [hereinafter cited as LARSON]; B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 4 (1950) [hereinafter cited as SMALL]; Kelly, *Workmen's Compensation—Still a Vehicle for Social Justice*, 55 MASS. L.Q. 251 (1970).
2. *See* 1 LARSON, *supra* note 1, § 5.20 at 37.
3. IND. CODE § 22-3-2-2 (1976). See SMALL, *supra* note 1, § 1.2 at 6.
4. *See* SMALL, *supra* note 1, § 1.2 at 6.
5. The employer had a third defense called the "fellow servant rule," which was a form of the assumption of risk doctrine. If the employee was injured through the act of one of his fellow workers, he could not maintain a cause of action against the employer. In other words, being injured by a fellow employee was among the risks assumed. The fellow servant defense is not listed in the body of this note because it bears little consequence on injuries caused by an employee's wilful conduct. *See* SMALL, *supra* note 1, § 1.2 at 6.
6. SMALL, *supra* note 1, § 1.2 at 6-7.
7. *Id.*

In 1929 the Indiana Legislature recognized the inadequacy and social injustice of the common law remedy and revoked it in favor of statutorily guaranteed compensation under the Workmen's Compensation Act.[8] As a symbol of equity for the laborer, the Act operates as a balance or mutual compromise between the interests of the employer and the employee.[9] The employee relinquishes his common law remedy and in turn the employer gives up his common law defenses.[10] The employee is guaranteed reasonable compensation for work-related injuries, while the employer is protected from unlimited liability.[11] Through this form of humanitarian[12] legislation, the legislature has indicated its belief that the financial burden of industrial injuries should be borne by industry rather than the employee.[13]

Despite the humanitarian motives behind workmen's compensation, the Act and its judicial application have failed to eliminate all of the inequities which characterized the common law approach to liability for industrial injury. For an injury to be compensable under the Act, it must satisfy the requirements of an "accident arising out of and in the course of the employment."[14] In furtherance of the legislative intent to supplant guaranteed compensation for the uncertainty of a common law action, the judiciary has liberally construed these conditions in favor of the employee and thus has, whenever possible, included the injury within the scope of the Act.[15] With

8. *Id. See also* In re Duncan, 73 Ind. App. 270, 127 N.E. 289 (1920).

9. *See generally* Aetna Cas. & Sur. Co. v. Hightower, 107 Ind. App. 46, 22 N.E.2d 875 (1939); In re Duncan, 73 Ind. App. 270, 127 N.E. 289 (1920); 2A LARSON, *supra* note 1, § 65.10 at 12-4.

10. *See* note 9 *supra.*

11. *Id.*

12. The courts often refer to the Workmen's Compensation Act as "humanitarian" or "remedial" legislation. This refers to the purposes which underlie the Act and the legislative intent to benefit the employee. Generally stated the purpose of the Act is to remove the injustice of the common law remedy and the common law protection of the employer by guaranteeing the employee reasonable compensation for his work-related injuries. In doing so the legislature has 1) freed the courts of the delays and costs of a regular tort action, 2) relieved the public welfare system of a large financial drain which would result if the employee or his family was restricted to a common law remedy, and 3) promoted the safety of the industrial setting by placing a limited economic burden on the employer for industrial injuries.

13. *See* notes 6 and 8 *supra* and accompanying text.

14. The Indiana Workmen's Compensation Act of 1929, IND. CODE § 22-3-2-2 (1976).

15. *See* Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sam Winer and Co. v. Spelts, ___ Ind.App. ___, 348 N.E.2d 670 (1976); Motor Dispatch, Inc. v. Snodgrass, 157 Ind. App. 591, 301 N.E.2d 251 (1973); Goldstone v. Kozma, 149 Ind. App. 626, 274 N.E.2d 304 (1971); Fogle v. Pullman Standard Car Mfg. Co., 133 Ind. App. 95, 173 N.E.2d 668 (1961).

respect to unintentional injury, this judicial approach has helped to effectuate the legislative purpose of removing from the employee the economic burden of work-related injuries.[16] However, liberal application of the Act has been extended so far as to include injuries caused by an employer's intentional or wilful conduct.[17] As a result the employer today enjoys a blanket protection against liability somewhat similar to that afforded him under the common law. Under present judicial interpretation of the Act, the employer can freely assault his employees or intentionally disregard any danger to them without fear of economic loss over and above his normal workmen's compensation insurance premiums. Thus, the Indiana Workmen's Compensation Act, which was intended to benefit the employee, is in effect condoning those actions of the employer which present the greatest risk of injury to the employee.

The source of the problem is twofold. First, the judiciary has misconstrued legislative intent to substitute the Act for pre-existing common law remedies. In addition the courts have failed to recognize that including injuries wilfully caused by the employer within the scope of the Act is highly inconsistent with the Act's purpose of benefiting the employee. Section 22-3-2-6 of the Act, commonly referred to as the "exclusive remedy clause," expresses a legislative intent to substitute the rights and remedies afforded by the Act for all pre-existing common law remedies.[18] The legislature, however, limited the scope of those rights and remedies by designating as compensable only the injuries which result from an "accident arising out of and in the course of the employment."[19] By limiting the scope of compensability, the legislature surely did not intend to remove all remedies from the employee whose injury is not compensable under the Act. Presumably, only when the circumstances of the injury satisfy the conditions of being both job-related and accidental did the legislature intend for an employee to be precluded from a common law cause of action.

Unfortunately, Indiana courts have treated the exclusive remedy clause as if it were unconditional and, in fact, determinative

16. *See* In re Duncan, 73 Ind. App. 270, 127 N.E. 289 (1920).

17. *See, e.g.*, North v. United States Steel Corp., 495 F.2d 810 (7th Cir. 1974); Selby v. Sykes, 189 F.2d 770 (7th Cir. 1951); Burkhart v. Wells Electronics Corp., 139 Ind. App. 658, 215 N.E.2d 879 (1966); Pearson v. Rogers Galvanizing Co., 115 Ind. App. 426, 59 N.E.2d 364 (1945); Harshman v. Union City Body Co., 105 Ind. App. 36, 13 N.E.2d 353 (1938); Furst Kerber Cut Stone Co. v. Mayo, 82 Ind. App. 363, 144 N.E. 857 (1924).

18. *See* IND. CODE § 22-3-2-6 (1976).

19. *See* IND. CODE § 22-3-2-2 (1976).

of whether the circumstances of the injury satisfy the conditions of compensability.[20] The employee is considered to have exchanged his common law remedy for the benefit of having a workmen's compensation system without reference to isolated injuries.[21] As a result attempts to maintain a common law action against the employer for wilful conduct have been decided on the basis of a judicially created goal of exclusivity.[22] Instead of independently determining whether wilful conduct falls within the scope of an accident arising out of and in the course of the employment, Indiana courts have merely accepted the resulting injury as compensable, via prima facie treatment of the Act as the employee's sole remedy.[23]

The scope of this note is limited to examining judicial interpretation of workmen's compensation law with respect to injuries sustained by the employee as a result of his employer's wilful conduct. The phrase "wilful conduct" is used to describe any conduct of the employer which involves a general or specific intent. In particular, this includes intentional acts such as the assault and battery of an employee, a wilful violation of a statutory safety regulation, and wilful and wanton misconduct; the latter generally being defined as conduct which exhibits a reckless disregard for the safety of others.[24] Not included within the scope of this note are forms of conduct such as ordinary negligence and gross negligence, since these degrees of conduct are unintended and so more clearly fall within the "accident" provision of the Workmen's Compensation Act.[25]

This note examines both past and present judicial application of industrial law in Indiana to injuries incurred by the wilful conduct of the employer. It will be shown that the present method by which the courts include such injuries within the scope of the Workmen's Compensation Act neither comports with the statutory requirements of what constitutes a compensable injury nor is consistent with the legislative goals which underlie the Act. The note concludes with a discussion of the options available to the Indiana courts and legislature for correcting the inequities that presently

20. *See* note 32 *infra and accompanying text.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Clouse v. Peden, 243 Ind. 390, 397, 186 N.E.2d 1, 4 (1962) (driving on a gravel road at 80 miles per hour "to see how fast the car would go" and with knowledge of approaching intersection). *See* 2A LARSON, *supra* note 1, §§ 68.30 to .35, at 13-18 to -40, for treatment of non-physical torts committed by an employer against an employee.
25. *See* W. PROSSER, THE LAW OF TORTS § 34 (4th ed. 1971).

surround the issue of liability for injuries which stem from an employer's wilful conduct.

JUDICIAL MISAPPLICATION OF THE ACT AS AN EXCLUSIVE REMEDY

The "exclusive remedy" clause expresses a legislative intent that the Workmen's Compensation Act function as the sole remedy for all industrial injuries which satisfy the conditions of an "accident arising out of and in the course of employment."[26] However, the courts have applied the exclusivity of the Act as if it were itself determinative of whether the injury meets the conditions.[27] This judicial interpretation of the Act contravenes both the historical goals of the Act and the scope of a compensable injury as intended by the legislature.

The Exclusive Remedy Clause

Judicial interpretation of the Workmen's Compensation Act has resulted in a double standard depending on whether the employee seeks workmen's compensation or a common law remedy for his injuries. When the employee desires compensation, the courts have consistently enhanced his opportunity for recovery by liberally construing the requisite conditions of a compensable injury.[28] The courts rationalize this construction as a furtherance of the humane purposes of the Act.[29] However, when the employee seeks a common law remedy, the courts have minimized the significance of the conditions in favor of an exaggerated emphasis on treatment of the Act as an exclusive remedy.[30] The scope of the conditions has been construed in furtherance of a judicially created degree of exclusivity rather than the humanitarian aspects of the Act.[31] Through use of this double standard the courts of Indiana have to date effectively precluded the employee's common law remedy against his employer.[32]

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26. *See* IND. CODE § 22-3-2-2 (1976).

27. *See* note 32 *infra* and accompanying text.

28. *See* note 15 *supra*. *See also* Prater v. Indiana Briquetting Corp., 253 Ind. 83, 251 N.E.2d 810 (1969); Burger Chef Syss., Inc. v. Wilson, 147 Ind. App. 556, 262 N.E.2d 660 (1970); DeArmond v. Myers Gravel & Sand Corp., 142 Ind. App. 60, 231 N.E.2d 864 (1967), *appeal after remand*, 145 Ind. App. 351, 251 N.E.2d 51 (1969).

29. *See* notes 15 and 28 *supra* and accompanying text.

30. *See* note 17 *supra*.

31. *Id.*

32. Indiana courts are familiar with an employee seeking a broad interpretation of the Act in order to include his injury therein. However, "a considerable amount of law, often bad law, has been made in damage suits in which the positions of the parties are reversed, with the employee denying coverage in order to escape the exclusive

Relevant sections of the Workmen's Compensation Act do not clearly preclude the employee's common law remedy for all injuries. Only when the injury is compensable under the Act has the legislature substituted statutory compensation for the common law. Section 22-3-2-2 of the Act requires that every employer and employee "shall be required to comply with the provisions of this law, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby. . . ."[33] In other words, the injury must satisfy the conditions of an "accident arising out of and in the course of the employment" in order to be compensable. Section 22-3-2-6 of the Act, the "exclusive remedy" clause, further requires:

> The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependants or next of kin, at common law or otherwise, on account of such injury or death.[34]

This section can be read and understood in two different ways, depending on whether the legislature intended the phrase "on account of personal injury or death" to state why the employee is "subject to this act" or when the rights and remedies are "granted to an employee." If "on account of personal injury or death by accident" modifies "subject to this act," then the sentence in effect says that "the rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee." Regardless of the cause of the injury, the Act would be the employee's only remedy for industrial injury. However, if the legislature intended the phrase to modify "granted" and thus restate the accident requirement of a compensable injury, then the employee's "other rights and remedies" appear to be excluded only when the employer suffers a compensable injury.

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remedy rule, and the employer with equal earnestness pleading for a broad construction of compensation coverage." 2A LARSON, *supra* note 1, § 65.10 at 12-5. Since the vast majority of workmen's compensation cases concern non-wilful injury, the courts are in the habit of broadly interpreting the Act in order to include the injury. As a result the courts seem to have equated the "inclusion" of industrial injuries with the concepts of "humanitarian legislation" and "liberally construing the Act in favor of the employee." However, the inclusion of an employer's wilful conduct is contrary to the legislative intent to benefit the employee and promote safety in the industrial setting. In effect the courts have created a legislative goal in order to maintain a consistent judicial emphasis on the inclusion of all injuries.

33. IND. CODE § 22-3-2-2 (1976).

34. IND. CODE § 22-3-2-6 (1976).

The second of these two alternatives is more plausible in light of the punctuation used in the statute and general furtherance of the goal of the Act to benefit the employee. The statute contains no comma after "employee" which could indicate a subsequent modifier. In addition, the purpose of benefiting the employee is furthered by the exclusion of his common law remedy only when he is offered a statutory compensation substitute.

In this context Sections 22-3-2-2 and 22-3-2-6 appear to allow the employee to maintain a common law action against his employer for wilful conduct *if* the employee's injury fails to satisfy the conditions of an "accident arising out of and in the course of the employment." Section 22-3-2-2 requires that an injury satisfy these conditions in order to be compensable. Section 22-3-2-6 provides that the rights and remedies of the Act (compensation for an "accident arising out of and in the course of the employment") shall constitute the employee's exclusive remedy against the employer "on account of such injury or death." In other words the exclusive nature of the Act as a remedy is restricted in application to those injuries for which compensation is granted. Therefore, the key factor in determining whether the Act precludes a common law action against the employer is the courts' interpretation of what constitutes an "accident arising out of and in the course of the employment." If the injury does not satisfy the necessary conditions, then it is not compensable and the Act should not operate to preclude a common law remedy.

Despite the language of the Act and its apparent meaning, in several decisions concerning an employer's wilful conduct, Indiana courts have over-emphasized the exclusivity of the Act and disregarded the statutory definitional requirements of those injuries which the Act was intended to cover.[35] This is exemplified by the holding in *Burkhart v. Wells Electronics Corp.*,[36] where the court denied the plaintiff-employee a common law action against her employer for an intentional assault. In arriving at its decision, the court failed to adequately determine whether an intentional assault satisfied the conditions of an "accident arising out of and in the course of the employment." The court totally disregarded the "accident" condition and found the "arising out of" condition to be satisfied without reference to either the meaning of the condition or the

35. *See* note 17 *supra*.

36. 139 Ind. App. 658, 215 N.E.2d 879 (1966). In *Burkhart* a male supervisory employee of the defendant employer struck "with great force" a union stewardess as the result of a controversy between them.

humanitarian goals of the Act.[37] When the plaintiff objected that applying the Act would shield the employer from greater civil liability, the court strongly emphasized the exclusive nature of the Act as a remedy in order to deny the action.[38]

The *Burkhart* holding is typical of several Indiana decisions which represent a judicial trend to minimize the significance and limit the scope of the phrase "accident arising out of the employment" in deference to the "exclusive remedy" clause.[39] The Act clearly expresses a legislative intent to apply the element of exclusivity only after the conditions of a compensable injury have been satisfied.[40] Yet the courts have applied the exclusivity independent of the conditions as if it were the only legislative purpose behind the enactment. Frequently cited, *In re Bowers*[41] exemplifies this trend:

> [I]t should be presumed from a consideration of the general spirit of the act and the sound economic policy upon which it is grounded that the Legislature did not intend by the act to narrow the rights of an injured employee, but rather that . . . the act, while not circumscribed by such limits, should extend to all situations wherein, were there no Workmen's Compensation Act, an injured employee would have his remedy at the common law for injuries received. . . .[42]

The *Bowers* court over-emphasized the notion of exclusivity to the point of making it nearly unconditional in the determination of which accidents give rise to a common law remedy and which fall within the purview of the Workmen's Compensation Act.

If the legislature had intended for such emphasis to be placed on the Act as an exclusive remedy, it could easily have made the theory of exclusivity applicable to all industrial injuries rather than just to "the rights and remedies granted to an employee subject to this act."[43] Instead the courts have in effect rewritten the Act, ignoring the statutory language which makes application of the exclusive remedy clause dependent upon satisfaction of the conditions which

37. *Id.* at 881.
38. *Id.*
39. *See* note 17 *supra* and accompanying text.
40. *See* IND. CODE § 22-3-2-6 (1976).
41. 65 Ind. App. 128, 116 N.E. 842 (1917).
42. *Id.* at 842.
43. *See* IND. CODE § 22-3-2-6 (1976).

define a compensable injury. The legislature intended for these conditions to be construed in favor of the employee in light of the purpose for which the Act was passed[44]—not in furtherance of the Act as an exclusive remedy. The exclusive nature of the Act should be construed in conjunction with, yet dependent upon, satisfaction of the conditions. This is the only manner in which the employee will receive compensation for his work-related injuries in the manner intended by the legislature.

EFFECT UPON THE CONDITIONS OF A COMPENSABLE INJURY

The exclusive nature of the Workmen's Compensation Act as a remedy is not determinative of whether an employee's common law action against his employer for wilful conduct is precluded by the Act. Common law actions are abrogated by the Act only when the employee's injury is sustained from an "accident arising out of and in the course of the employment." However, the exaggerated emphasis which the courts have placed on the element of exclusivity has affected the interpretation of these conditions. The following section examines this judicial interpretation and how it should be corrected in order to further the Act's purpose of eliminating the inequities which existed under the common law.

Intentional Conduct May Result in an Accident So Long as it is Unexpected

Indiana courts have generally defined the term "accident" as an "unlooked for mishap, an untoward event, which is not expected or designed."[45] In determining the scope of this definition, the courts

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44. *See* note 15 *supra* and accompanying text.

45. *See* Haskell & Barker Car Co. v. Brown, 67 Ind. App. 178, 117 N.E. 555 (1917). *See also* the following Indiana cases, each of which uses this definition as a beginning point for argument: Heflin v. Red Front Cash & Carry Stores, Inc., 225 Ind. 517, 75 N.E.2d 662 (1948); United States Cas. Co. v. Griffis, 186 Ind. 126, 114 N.E. 83 (1916); Ellis v. Hubbell Metals, Inc., ___ Ind. App. ___ , 366 N.E.2d 207 (1977); Inland Steel Co. v. Almodovar, ___ Ind. App. ___ , 361 N.E.2d 181 (1977); Estey Piano Corp. v. Steffen, 164 Ind. App. 329, 328 N.E.2d 240 (1975); Bethlehem Steel Corp. v. Cummings, 160 Ind. App. 160, 310 N.E.2d 565 (1974); Wolf v. Plibrico Sales & Serv. Co., 158 Ind. App. 111, 301 N.E.2d 756, *rehearing denied*, 159 Ind. App. 43, 304 N.E.2d 355 (1973); Chestnut v. Coca Cola Bottling Co., 145 Ind. App. 504, 251 N.E.2d 575 (1969); Pearson v. Rogers Galvanizing Co., 115 Ind. App. 426, 59 N.E.2d 364 (1945); American Maize Prod. Co. v. Nichiporchik, 108 Ind. App. 502, 29 N.E.2d 801 (1940); General Printing Corp. v. Umback, 100 Ind. App. 285, 195 N.E. 281 (1921); Townsend & Freeman Co. v. Taggart, 81 Ind. App. 610, 144 N.E. 556 (1924); Standard Cabinet Co. v. Landgrave, 76 Ind. App. 593, 132 N.E. 661 (1921); Indian Creek Coal Co., v. Calvert, 68 Ind. App. 474, 119 N.E. 519 (1918); Puritan Bed Springs Co. v. Wolf, 68 Ind. App. 330, 120 N.E. 417 (1918).

have often stated that the word "accident" should be used in its popular sense.[46] Because popular use of the term "accident" does not contemplate events or injuries caused intentionally, logic would mandate that a clear distinction be made in workmen's compensation decisions between conduct involving a general or specific intent and negligent behavior. The courts, however, have included injuries resulting from both types of conduct within the scope of the "accident" condition.[47] The courts' categorization of wilful conduct as an accident appears to be based upon a strained expansion of the "unexpected result" theory,[48] a test originally used by the courts to determine an employer's liability for injuries caused solely by non-wilful or unintentional behavior.[49]

In defining the word "accident" with respect to non-wilful injury, most courts follow the "unexpected event" theory[50] stating that an accident is a "mishap or untoward event not expected or designed."[51] In defining what constitutes an unexpected event, the courts have utilized two theories: the "unexpected cause" and the "unexpected result."[52] Under the "unexpected cause" theory, an unexpected "event" or "accident" cannot occur in the absence of some kind of increased risk such as unusual exertion or the malfunction of a machine which causes the injury.[53] By comparison the "un-

46. *See, e.g.*, Stacey Bros. Gas Const. Co. v. Massey, 92 Ind. App. 348, 175 N.E. 368 (1931); Haskell & Barker Car Co. v. Brown, 67 Ind. App. 178, 117 N.E. 555 (1917).

47. *See* North v. United States Steel Corp., 495 F.2d 810 (7th Cir. 1974); Selby v. Sykes, 189 F.2d 770 (7th Cir. 1951); Burkhart v. Wells Electronics Corp., 139 Ind. App. 658, 215 N.E.2d 879 (1966); Pearson v. Rogers Galvanizing Co., 115 Ind. App. 426, 59 N.E.2d 364 (1954); Harshman v. Union City Body Co., 105 Ind. App. 36, 13 N.E.2d 353 (1938); Furst Kerber Cut Stone Co. v. Mayo, 82 Ind. App. 363, 144 N.E. 857 (1925).

48. *See* Ellis v. Hubbell Metals, Inc., ____ Ind. App. ____ , 366 N.E.2d 207 (1977); Indian Creek Coal Co. v. Calvert, 68 Ind. App. 474, 119 N.E. 519 (1918).

49. Indian Creek Coal Co. v. Calvert, 68 Ind. App. 474, 119 N.E. 519 (1918).

50. *See* note 45 *supra*.

51. During the last several years in Indiana, the topic of dispute in most of the litigated workmen's compensation cases has shifted from the accident condition and has focused instead on whether the injury arose out of and in the course of the employment. Although the accident requirement appears to be conceded, especially in cases involving claims for cancer, stomach ulcer, and heart and circulatory difficulties, the courts still require some untoward or unexpected event. *See, e.g.*, Wolf v. Plibrico Sales & Serv. Co., 158 Ind. App. 111, 301 N.E.2d 756 (1973), *rehearing denied*, 159 Ind. App. 43, 304 N.E.2d 355 (1973). *See also* SMALL, *supra* note 1, § 5.1 (1950 & Supp. 1976).

52. Ellis v. Hubbell Metals, Inc., ____ Ind. App. ____ , 366 N.E.2d 207 (1977). *See also* SMALL, *supra* note 1, § 5.1 (1950 & Supp. 1976).

53. *See* SMALL, *supra* note 1, § 5.1; Rivera v. Simmons Co., 164 Ind. App. 381, 329 N.E.2d 39 (1975). The unexpected cause theory has also been referred to as the "increased risk doctrine." This is an area of workmen's compensation law where it is

expected result" theory holds that an accident may occur where everything preceding the injury was uneventful and only the injury itself was unexpected.[54] The judiciary favors the "result" definition of an unexpected event because it expands the scope of the Act to include non-wilful injuries that occur in the absence of an increased risk.[55] For example, an accident "results" when an employee is injured by stooping or lifting in the course of his everyday duties even though the causal relationship between the job and the injury is remote.[56] The injury is compensable because the event is unexpected. By widening the class of compensable injuries to include injuries which occur without an unexpected "cause," the "unexpected result" theory favors the employee and furthers the humanitarian nature of the Act.[57]

A form of the "unexpected result" theory has also been utilized by Indiana courts to include wilful injuries within the scope of the accident condition.[58] However, because the element of intent in wilful conduct does not blend well with the notion of an "unexpected result," the judiciary employs the theory somewhat uniquely.[59] Unlike non-wilful conduct, wilfully caused injuries usually involve more than one person and more than one mental viewpoint. Using these added elements, the courts have found it necessary to decide whether the injury should be unexpected and without design from the viewpoint of the employee, the employer, or both.

Popular use of the term "accident" suggests that an injury should be unexpected and undesigned from the standpoint of a third person or at least from that of both the employer and the employee.[60]

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often difficult to differentiate between the "accident" and "arising out of" conditions. The purpose of requiring an increased risk is to cement the causal relationship between the injury and the employment. For an excellent discussion on the varying treatment of the increased risk doctrine in Indiana courts, *see* SMALL, *supra* note 1, § 6.2 (Supp. 1976).

54. *See* Ellis v. Hubbell Metals, Inc., ___ Ind. App. ___ , 366 N.E.2d 207 (1977); Inland Steel Co. v. Almodovar, ___ Ind. App. ___ , 361 N.E.2d 181 (1977); Lock-Joint Tube Co. v. Brown, 135 Ind. App. 386, 191 N.E.2d 110 (1963).

55. Ellis v. Hubbell Metals, Inc. ___ Ind. App. ___ , 366 N.E.2d 207 (1977).

56. *See* note 54 *supra* and accompanying text.

57. *See* Motor Dispatch Inc. v. Snodgrass, 157 Ind. App. 591, 301 N.E.2d 251 (1973). *See also* note 55 *supra* and accompanying text.

58. The reader should note that there has been very little litigation in Indiana on the question of an employer's wilful conduct. The judicial desire to include as many industrial injuries within the scope of the Act as possible is evident in judicial treatment of both types of injury.

59. *See* note 61 *infra* and accompanying text.

60. Popular use of the term "accident" with respect to wilful injuries suggests that the injury or occurrence be unexpected and without design from anyone's point of

However, in order to include wilful injury within the scope of the Act, Indiana courts have stated that the term "accident" is to be "used in its popular sense, and means any mishap or untoward event, not expected, and not designed by the one who suffered the injury."[61] This approach is similar to use of the "unexpected result" theory in the non-wilful injury context in that it speaks to the result and its unexpected nature from the standpoint of the injured employee rather than that of the employer who causes the injury. Although the employer reasonably expects or even intends the consequences of his conduct, the employee cannot successfully claim exception to the "exclusive remedy" clause on the basis that the injury was not caused by accident because, as with most injuries, the employee did not expect to be injured. Such logic suggests that if the employee did expect to be injured, the injury could not have occurred by accident.

Treatment of Wilful Injuries as Unexpected Events is Not Beneficial Overall to the Employee

At first glance, viewing a wilful injury from the standpoint of the person who is injured appears to benefit the employee. By including wilful injuries within the scope of the "accident" condition, the employee is provided with a broader guarantee of compensation. Unfortunately, guaranteed compensation is not entirely favorable to the employee in the context of wilful injuries because it offers no deterrence to such conduct. In fact the judiciary's exaggerated emphasis on inclusion of all industrial injuries within the scope of the Act has actually placed the employee in a position which is less bene-

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view. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 11 (1961) defines accident as a) "an event or condition occurring by chance or arising from an unknown or remote cause;" b) "lack of intention or necessity;" c) "an unforeseen unplanned event or condition." No matter how liberally the courts wish to construe the term "accident," the essential elements of its meaning must remain reasonably the same or it becomes a word different from that used by the legislature.

61. Pearson v. Rogers Galvanizing Co., 115 Ind. App. 426, 59 N.E.2d 364 (1945); Furst Kerber Cut Stone Co. v. Mayo, 82 Ind. App. 363, 144 N.E. 857 (1924). Viewing an injury which results from the wilful conduct of another from the standpoint of the injured seems to have originated in England. The House of Lords deliberated for several weeks over a case where reform school boys with brooms killed their teacher. The House ruled the death was an accident from the teacher's point of view and therefore compensable. Trim Joint District School v. Kelly, A.C. 667, 7 B.W.C.C. 274 (1914). However, where the assault was by the employer himself instead of a fellow employee or a third party, the House of Lords denied compensation. Blake v. Head, 106 L.T. 822, 5 B.W.C.C. 303 (1912). *See* Horovitz, *Modern Trends in Workmen's Compensation*, 21 IND. L. J. 473 (1946).

ficial to him than that which he experienced under the common law.[62]

Prior to the Act, a common law remedy against the employer for *wilful* conduct was the only cause of action in which the employee was likely to be successful against his employer. Under the common law, the employee was often denied any form of compensation for his injuries because of the difficulty of avoiding the defenses of contributory negligence and assumption of risk in a negligence action against the employer.[63] However, under common law tort theory, these defenses would have been of little use to the employer against an action for wilful conduct such as an intentional assault or wilful and wanton misconduct.[64] Thus, prior to the Act, the employee's best opportunity to receive compensation for work-related injuries lay in court with an action for an intentionally caused injury.

While an action for intentional or wilful tort was the most beneficial of remedies for the employee under common law, nearly complete elimination of the employee's opportunity to seek a common law remedy has today become the aspect of workmen's compensation law which is most detrimental to the employee.[65] The extent of the employee's recovery under the Act for wilful injury is limited to the statutory amount established in the Act.[66] As a result, there are few economic restraints on the conduct of the employer.[67] The employer is relatively free to wilfully injure his employees without fear of loss over and above his normal workmen's compensation insurance premiums. In effect the courts' exaggerated emphasis on exclusivity and unique treatment of the accident condition in the wilful injury context has afforded the employer a form of protection not unlike that which he enjoyed under the common law where he often escaped liability for his misconduct. Meanwhile the employee is arguably in a worse position today with respect to wilful injury than he was under the common law.[68]

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62. *See* notes 30 and 31 *supra* and accompanying text.

63. *See* note 5 *supra* and accompanying text.

64. *See* W. PROSSER, THE LAW OF TORTS § 65, at 424 and § 68, at 444 (4th ed. 1971).

65. Although the employee appears to have been benefited by guaranteed compensation under the Act, he is in fact in a worse position today than under the common law with respect to the deterrence of an employer's wilful conduct.

66. IND. CODE § 22-3-2-6 (1976).

67. *See* note 117 *infra*.

68. Both workmen's compensation and a common law action for damages are means of providing the employee with the necessary dollars to cover the expenses of his injury. Workmen's compensation is guaranteed, yet minimal in amount. A common

An approach to industrial injury which would be more equitable and beneficial to the employee would involve actually utilizing the term "accident" in its popular sense.[69] In this manner the elements of expectation and design would need to be absent from the standpoint of both the employer and the employee in order to satisfy the "accident" condition.[70] Non-wilful injuries would fall within the "accident" condition because they are unexpected from the viewpoint of both the employer and the employee. Wilful injuries, however, would fail to satisfy the "accident" condition because the employer who intentionally caused the injury could not claim it to be unexpected or without design.[71] The "exclusive remedy" clause[72] of the Act would be inapplicable and the employee would be allowed to maintain a cause of action against the employer.

Under this approach employers who wilfully injure their employees would lose the limited liability protection of the Workmen's Compensation Act. The employee could exercise the opportunity to gain adequate compensatory damages as well as punitive damages for the employer's wilful behavior. This approach would be consistent with the legislature's attempt to provide the employee with adequate compensation for his injuries and, at the same time, serve to deter the wilful conduct of the employer through the threat of economic loss exceeding the normal workmen's compensation payments.

The Accident Must Arise Out of the Employment

In addition to being unexpected, an accident must "arise out of and in the course of the employment in order for the injury to be compensable."[73] The "arising out of" condition requires that a causal connection exist between the accident and the performance of an

law action offers no guarantees of recovery yet is the only means of attaining compensation commensurate with all the consequences of a permanent injury (the price of an eye, the value of one's potential earning power, etc.). A common law action can function as a deterrent through punitive damages, while workmen's compensation in effect condones an employer's wilful conduct. The optimal choice is most likely a combination of the two, such that if the action fails the employee can still obtain minimal compensation under the Act.

69. *See* note 60 *supra*.

70. *Id.*

71. *See* 2A LARSON, *supra* note 1, § 68 at 13-1.

72. IND. CODE § 22-3-2-2 (1976).

73. *Id.* This phrase has been aptly described as "deceptively simple and litigiously prolific." Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 470 (1947).

employment task.[74] The companion condition, "in the course of," has been regarded by the courts as connoting an injury which occurs within the time period of the employment and at a place where the employee may reasonably be while performing his duties or something reasonably incidental thereto.[75] The time and place requirements of a compensable injury are the same for both wilful and non-wilful injuries.[76] Therefore, this section focuses primarily on the effect which the courts' eagerness to include wilful injuries within the Act has had upon judicial interpretation of the "arising out of" condition.

Indiana courts have generally held the accident to arise out of the employment when it originates from "a risk which a reasonably prudent person might comprehend as incidental to the employment at the time of entering into it, or, when the facts show an incidential connection between the conditions under which the employee works and the injury."[77] As suggested by the courts' use of the phrase "incidental to the employment," the "arising out of" condition contemplates the factors of origin, source, or contribution rather than causation in the sense of being proximate or direct.[78] The standards of a satisfactory connection between the accident and the risks of the employment are far less restrictive than the limitations of the tort law concept of proximate cause.[79] Causation is established when the employment is a contributing cause or source of the injury.[80]

Although the employment need not be a proximate cause of the injury, it should be more than a "cause in fact" to satisfy the "arising out of" condition. A "but for" or "cause in fact" test tends to equate the "arising out of" condition with its counterpart, "in the

74. *See, e.g.*, Noble v. Zimmerman, 237 Ind. 556, 146 N.E.2d 828 (1957), *reversing on transfer*, ___ Ind. App. ___, 137 N.E.2d 233 (1956); SMALL, *supra* note 1, § 7.2 (1950 & Supp. 1976).

75. *See, e.g.*, Noble v. Zimmerman, 237 Ind. 556, 559, 146 N.E.2d 828, 838 (1957).

76. The notions of time and place do not speak to the nature of the accident. Therefore, the injury will have occurred either in or out of the course of the employment regardless of whether the act which produces the injury is wilful.

77. Lasear, Inc. v. Anderson, 99 Ind. App. 428, 434, 192 N.E. 762, 765 (1934). *See* Kariger Motors, Inc. v. Kariger, 132 Ind. App. 85, 173 N.E.2d 916 (1961); Broderick Co. v. Flemming, 116 Ind. App. 668, 65 N.E.2d 257 (1946); Hayes v. Perry, 116 Ind. App. 590, 66 N.E.2d 73 (1946); Tom Joyce 7 Up Co. v. Layman, 112 Ind. App. 369, 44 N.E.2d 998 (1942). *See also* Note, *Recreational Injuries and Workmen's Compensation: Infusion of Common-Law, Agency-Tort Concepts*, 34 IND. L.J. 310 (1959).

78. *See* Armstead v. Sommer, 126 Ind. App. 273, 131 N.E.2d 340 (1956); Olson v. Trinity Lodge, 226 Minn. 141, 32 N.W.2d 255 (1948); 1 LARSON, *supra* note 1, § 6 at 3-1.

79. 1 LARSON, *supra* note 1, § 6 at 3-1.

80. *Id.*

course of." To say "but for the employment" is little different from saying "but for the employee's presence at that time and in that place, the injury would not have occurred." The "arising out of" condition speaks to the origin of the risk to the employee as opposed to the time and place of the accident.[81]

The conditions of the employment when the employee first accepts the job or under which the employee presently works comprise a special zone of danger peculiar to the employment.[82] From this zone the risk of a particular injury must originate in order to be compensable. It is not a question of whether the risk or hazard is peculiar to the employment, but whether the employment is the predominant factor in exposing the employee to the risk in a greater degree than if he was pursuing his own personal affairs.[83] In other words the zone of danger created by the hazards of the employment is distinguishable from a zone of danger which is common to society as a whole. If the injury originates particularly from the employment zone, then it satisfies the "arising out of" condition.[84]

Legislative use of the phrase "arising out of" has left much room for judicial determination of what risks originate in the employment. Since the language of the Workmen's Compensation Act itself offers no clue as to the scope of the "arising out of" condition, the judiciary has correctly chosen to interpret the condition in light of the legislative intent in passing the Act. The courts have often stated that the Act should be liberally construed in favor of the employee in order to further the humanitarian purposes that underlie the Workmen's Compensation Act.[85]

The best means of determining whether the courts have indeed furthered the goals of the Act in their treatment of wilful injuries is to look at the results of that treatment.[86] In *Selby v. Sykes*,[87] an

81. *Id.*

82. *Cf.* O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), *reversing*, 182 F.2d 772 (9th Cir. 1950); Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711 (1920).

83. *See* note 77 *supra*.

84. *See* Armstead v. Sommer, 126 Ind. App. 273, 131 N.E.2d 340 (1956). *See also* note 77 *supra*.

85. *See* notes 15 and 28 *supra* and accompanying text.

86. Looking at the result involves a question of perspective. To the employee who seeks inclusion under the Act, a judicial determination that the risk involved is "of the employment" appears to be a furtherance of the legislative intent to benefit the employee. To the employee who is wilfully injured by his employer and who seeks a common law remedy, a determination that wilful conduct is an "incident of the employment" appears destructive of legislative intent.

87. 189 F.2d 770 (7th Cir. 1951).

employee brought a common law action against the employer for injuries sustained when he fell through a weakened portion of the roof on which he was working.[88] Despite his protests the employee had been ordered by the employer to work during high winds on the snow-covered roof.[89] Ignoring the unusual risk forced upon the employee, the court held that the employer's wilful and wanton misconduct and wilful violation of a statutory duty was incidental to and, therefore, arose out of the employment.[90] In *Burkhart v. Wells Electronics Corp.*,[91] a female employee was assaulted and battered by her employer following a work-related argument.[92] The court suggested that an assault and battery which resulted from personal reasons may fall outside the scope of the "arising out of" condition.[93] However, due to the work-related nature of this argument, the court found the employer's wilful conduct had originated in the employment.[94] In both *Selby* and *Burkhart* the courts ignored the actual risk to the employee created by the employer's wilful conduct as well as the nature of the employer's intent as a potential superceding cause of the injury.[95]

This judicial disregard for the actual risks created by an employer's wilful conduct is contrary to the intent of the legislature to benefit the employee under the Workmen's Compensation Act and to promote safety in the industrial setting.[96] Prior to the

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88. *Id.*
89. *Id.* at 772.
90. *Id.*
91. 139 Ind. App. 658, 215 N.E.2d 879 (1966).
92. *Id.*
93. *Id.* at 881.
94. *Id.*
95. *See* note 17 *supra* and accompanying text. It is arguable that the origin of wilful conduct lies neither in the employment situation nor is society generally, but rather in the intent formed by the employer's reaction to those situations. It is the element of intent or wilfulness which makes the employer's wilful conduct particularly dangerous to the employee. The employment does contribute to an employer's wilful conduct but not in a manner significantly different enough from society in general to warrant judicial disregard of the employer's responsibility for his own actions. To rule otherwise is to say that there is an element of the employment itself which primarily leads to the wilful conduct. This shift in emphasis from the employer's intent to the employment as the origin of a wilful act stretches the limits of a causal connection to the breaking point. The legislative intent to benefit the employee and promote safety in the industrial setting through the Workmen's Compensation Act is hardly furthered by such a construction.
96. *Cf.* American Steel Foundries v. Fisher, 106 Ind. App. 25, 17 N.E.2d 840 (1938). *See also* Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1939); Readinger v. Gottschall, 201 Pa. Super. 134, 191 A.2d 694 (1963).

passage of the Act, there was little incentive for the employer to provide the employee with safe working conditions.[97] The common law remedy was inadequate as a means of applying economic leverage against the employer, and there were few available governmental sanctions against unsafe employment practices.[98] Today under the Act, the employer must seek to prevent injury if he wishes to reduce the amount of compensation being paid to his employees.[99] In addition, the legislature has established various regulatory schemes under the Indiana Occupational Safety and Health Act[100] which make available sanctions against the employer who violates established safety regulations.[101]

Despite this trend toward greater protection and benefit for the employee, the courts of Indiana have stretched the concept of risks incidental to the employment to include all forms of an employer's wilful conduct except a personally related assault and battery.[102] Thus, most wilful injuries are classified as compensable along with non-wilful injuries regardless of differences between the two in the origin of the risk and the likelihood of danger which faces the employee.[103] The employee's common law remedies are precluded

97. *See* note 1 *supra* and accompanying text.

98. *See* note 1 *supra* and accompanying text. The Indiana Employer's Liability Law of 1911, IND. CODE 22-3-9-1 (1976), provides for liability of employers of five persons or more for death or injury to an employee resulting from negligence on the part of the employer. It also contains some limitations upon the use of the contributory negligence, assumption of risk, and fellow-servant defenses. Nevertheless, the courts, bound by precedent, continue to produce pro-employer decisions. *See* North v. United States Steel Corp., 495 F.2d 810 (7th Cir. 1974); Horovitz, *Modern Trends in Workmen's Compensation*, 21 IND. L.J. 473 (1946); SMALL, *supra* note 1, § 2.4.

99. In most situations the employer will probably be trying to keep his workmen's compensation insurance premiums at a minimum.

100. IND. CODE §§ 22-8-1.1-1 *et. seq.* (Supp. 1978).

101. Both IOSHA and the Occupational Safety and Health Act, 28 U.S.C. §§ 651 *et seq.* (1976), provide penalties for unsafe industrial practices. In particular, Section 22-8-1.1-36-1 of IOSHA provides for fines of up to $10,000 and imprisonment of up to six months for an employer's first offense in wilfully violating any standard or rule and thereby causing the death of an employee. However, due to the nature of wilful conduct, the effect of such sanctions as a deterrent may be minimal. Established safety regulations cannot account for the spontaneous and often momentary aspects of wilful conduct. Nor does such sanction provide for wiful conduct which results in injury short of death.

Placing a governmental sanction on the employer for his wilful conduct does little to enhance the economic situation of the employee and/or his family. If the employer is to sustain an economic loss as the result of his conduct, it seems far more equitable and just to give the money to the employee rather than the government.

102. *See* note 91 *supra* and accompanying text.

103. *See* notes 17 and 95 *supra* and accompanying text.

and the employer pays the same insurance premium whether he intentionally caused the injury or not. The courts are in effect saying that neither legislative intent nor public policy warrants the deterrence of wilfully caused injuries. According to this rationale, the person who accepts employment is in effect also made to accept the risk of being wilfully injured by his employer as a natural risk of any employment situation.

The inclusion of wilful conduct within the scope of the "arising out of" condition neither benefits the employee nor promotes safety in the industrial setting. By its use of the phrase "arising out of," the legislature allowed the judiciary the freedom to determine what risks are incidental to the employment in light of the humanitarian purposes which underlie the Act.[104] In order to construe the Act in favor of the employee and, in light of the principles which underlie the Act, the courts should limit the scope of the condition to those risks which are *reasonably* incidental to the employment. No reasonable man would equate wilful and non-wilful conduct in terms of the degree of risk which faces the employee. Nor would a reasonable man contemplate the risk of wilful injury as a natural risk of the employment. Under this construction the employer's wilful conduct would not arise out of the employment. The possibility would then exist for a common law remedy against the employer and the use of punitive damages as a deterrent.

As a result of the courts' denial of punitive damages via a common law action against the employer, there are today no effective deterrents against the wilful conduct of an Indiana employer. The employer can ignore the minimal cost of compensation benefits and continue with impunity to disregard the safety of the employee.[105] In effect the courts have condoned actions of the employer which are contrary to both public policy and the humanitarian ideals which fostered the passage of the Workmen's Compensation Act.

CORRECTION OF THE INEQUITIES CREATED BY JUDICIAL TREATMENT OF EMPLOYERS' WILFUL CONDUCT

The Indiana Legislature intended for the Workmen's Compensation Act to function as a balance between the employer and employee in terms of the rights each surrenders under the Act.[106]

104. *See* notes 28 through 32 *supra* and accompaning text.

105. *See Survey—Workmen's Compensation*, 8 IND. L. REV. 289, 294 n.34 (1974).

106. *See generally* Aetna Cas. & Sur. Co. v. Hightower, 107 Ind. App. 46, 22 N.E.2d 875 (1939); In re Duncan, 73 Ind. App. 270, 127 N.E. 289 (1920); 2A LAR-

However, as a result of judicial misapplication of the principles of the Act to wilful injuries, the balance has been tipped in favor of the employer. In order for the Act to regain this balance as well as the characteristics of a remedial law designed to benefit the employee, both the legislature and the courts must recognize the inequitable results which have developed from the failure to distinguish between wilful and non-wilful conduct under workmen's compensation law. Several options are available to the Indiana Legislature for righting the scales of the Workmen's Compensation Act and recognizing this distinction.

The Workmen's Compensation Act as a Balance Between the Interests of the Employer and the Interests of the Employee

Although the Indiana Workmen's Compensation Act was enacted primarily for the benefit of the employee, it was also intended to function as a balance or mutual compromise whereby both the employee and the employer relinquish some of their rights and in turn receive certain benefits.[107] The employee is guaranteed prompt and moderate compensation for his injuries regardless of fault and in exchange relinquishes his rights to a common law action.[108]

With respect to non-wilful conduct, the balance represents a rational and economically sound program. However, inequities which undermine the purpose and spirit of the Act occur when the employee is injured by the wilful conduct of his employer and then forced to accept the limited workmen's compensation benefits for the injury. By including an employer's wilful conduct within the scope of the Act, present Indiana case law indirectly condones the employer's actions. In doing so, the courts have tipped the balance which the legislature imposed on the employer and employee in favor of the employer.[109] To restore the system to its intended equitable compromise, the legislature and/or the courts must recognize the high risk of injury which accompanies wilful conduct and the necessity for deterring such conduct.

SON, *supra*, note 1, § 65.10 at 12-4; Comment, *Workmen's Compensation and Employer Suability: The Dual-Capacity Doctrine*, 8 ST. MARY'S L.J. 818 (1974).

107. *See* 2A LARSON, *supra* note 1, § 65.10 at 12-14.

108. *Id.*

109. Judicial treatment of the employer's wilful conduct has not likely induced the employer to spend large sums of money in order to provide a reasonably safe industrial setting. Rather the courts have allowed the employer freedom to weigh the expense of providing a reasonably safe place of employment against the relatively insignificant increase in his workmen's compensation insurance premiums which may result from an increase in the number of injuries among his employees.

The Workmen's Compensation Act provides the employer with numerous defenses based upon an employee's wilful conduct which can be used to defeat a compensation claim, but it does not grant similar defenses to the employee.[110] For example, the employee loses his benefits if the injury is due to his wilful commission of a minor offense or misdemeanor,[111] while the employer who wilfully injures an employee is not penalized for his conduct. Instead he pays only the usual benefits accorded the employee. Since these costs are absorbed by the employer's insurance carrier whose premiums are paid by the consumer in the form of higher prices for services and merchandise, the employer experiences little or no economic consequence of his wilful conduct.[112]

The purpose of allowing the employer to assert defenses under the Act is to protect the employer from liability for injuries which occur despite the reasonable measures he undertakes to promote safety.[113] With the possible exception of misdemeanors, each defense provided for in Section 22-3-2-8 of the Act includes the element of knowledge or wilfulness.[114] Thus the employee conduct contemplated

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110. IND. CODE § 22-3-2-8 (1976), states that:

> No compensation is allowed for an injury or death due to the employee's knowingly self-inflicted injury, his intoxication, his commission of an offense, his knowing failure to use a safety appliance, his knowing failure to obey a reasonable written or printed rule of the employer which has been posted in a conspicuous position in the place of work, or his knowing failure to perform any statutory duty. The burden of proof is on the defendant.

In each case the misconduct of the employee must be found to have caused the injury. *Compare* Hayes Freight Lines v. Martin, 119 Ind. App. 97, 84 N.E.2d 205 (1949), *superseding*, 118 Ind. App. 139, 77 N.E.2d 900 (1948), *with* Gary Railways v. Garling, 120 Ind. App. 36, 88 N.E.2d 571 (1949). *See also* SMALL, *supra* note 1, § 11.1 (1950 & Supp. 1976); 81 AM. JUR. 2d *Workmen's Compensation* § 237 at 889 (1976).

111. *See, e.g.*, Price v. Reed, 114 Ind. App. 253, 51 N.E.2d 86 (1943); Anti-Mite Eng'r Co. v. Peerman, 113 Ind. App. 280, 46 N.E.2d 262 (1943); Wood v. Snyder, 83 Ind. App. 31, 147 N.E. 314 (1925). When the Workmen's Compensation Act was reenacted in 1929, the legislature separated the element of wilfulness from misdemeanors in Section 22-3-2-8 of the Act. Therefore, a misdemeanor need not even be wilful in order to bar the employee from compensation. It is enough that he commits the misdemeanor, unwittingly or not. In effect this has brought back into the Act the elements of assumption of risk and contributory negligence. SMALL, *supra* note 1, § 11.1 (Supp. 1976).

112. *See* Aetna Cas. & Sur. Co. v. Hightower, 107 Ind. App. 46, 22 N.E.2d 875 (1939); In re Duncan, 73 Ind. App. 270, 127 N.E. 289 (1920).

113. Western Union Tel. Co. v. Owens, 82 Ind. App. 474, 146 N.E. 427 (1925). *See* National Biscuit Co. v. Roth, 83 Ind. App. 21, 146 N.E. 410 (1925); General American Tank Car Corp. v. Borchardt, 69 Ind. App. 580, 122 N.E. 433 (1919).

114. The Act does not specifically attach the word "wilful" to the commission of an offense or intoxication. Nevertheless, the term "intoxication" and many types of

by this section is effectively beyond the scope of conscientious preventative measures.[115]

It makes equally as much sense to levy such penalities against the employer for his wilful conduct. In the employment situation, it is the employer who has the greatest ability to affect the safety of working conditions. He is in the best position to control the actions of the employees and is the only one who can directly prevent his own wilful conduct. Yet, in effect, present application of the Act forces the employee to endure his employer's wilful disregard for safety as if it were a natural element of the employment. If it is sound policy to deny the employee compensation when he wilfully disregards his own safety, then it is equally as sound to penalize the employer who endangers the lives of his employees.

As a result of the Indiana judicial denial of a common law action against the employer for his wilful conduct and legislative inclusion of employer defenses, the workmen's compensation system no longer functions as an equitable balance or compromise. The scales are clearly tipped in favor of the employer instead of the employee for whom the Act was originally passed. The present judicial interpretation of the Act is indirectly contrary to legislative intent and can best be corrected through a legislative and/or judicial effort to deter the wilful conduct of the employer.

Legislative and Judicial Options for Compensating the Employee Injured by His Employer's Wilful Conduct

In order to correct the inequitable imbalance created by judicial application of the Workmen's Compensation Act to an employer's wilful conduct, the employee injured by his employer should be allowed either a common law remedy against the employer or a percentage increase in his normal compensation benefits.[116] Either remedy will help restrict the employer's freedom to wilfully injure an employee by increasing the employer's economic losses. A choice of one or a combination of both must be predicated on furtherance of the Workmen's Compensation Act as a remedial legislative measure enacted primarily for the benefit of the employee.

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offenses carry with them at least some degree of wilful action—as opposed to those offenses formerly called misdemeanors, which a person can commit unwittingly. *See* note 111 *supra*.

115. *See* Davis, *Workmen's Compensation*, 33 ATL L.J. 140 (1970); Comment, *Serious and Wilful Misconduct Clauses of California Workmen's Compensation Act*, 22 Cal. L. Rev. 432 (1934).

116. *See* 2A LARSON, *supra* note 1, § 69 at 13-41.

The Indiana judiciary's surprising construction of the Act as an exclusive remedy has counteracted the legislative intent to benefit the employee. Thus it seems fitting for the judiciary to reevaluate a judicial construction that dates back to the 1920's. Nevertheless judicial abstention in Indiana appears to be firmly imbedded. The courts argue that the legislature alone is empowered to alter legislative mandates; that it is less restricted than the judiciary and better equipped to weigh the benefits which either a common law remedy or a percentage increase in compensation benefits would afford the employee. The legislature has the power to act more quickly and to clearly spell out the intent of any changes it deems necessary to further the humanitarian function of the Act.

To date, this judicial policy of abstention appears to be accepted by a majority of other jurisdictions as well. At least sixteen states have enacted statutory provisions which provide the employee with either a common law remedy, a percentage increase in compensation, or both for injuries resulting from an employer's wilful conduct.[117] In at least one state, New York, the judiciary has stepped forth to grant the employee a common law remedy.[118]

Either the percentage increase or the common law remedy can function in a variety of ways depending upon legislative or judicial discretion.[119] Under the common law remedy, the injured employee can accept the normal workmen's compensation benefits, then elect to sue and subrogate the employer's workmen's compensation insurance carrier if the action is successful.[120] Alternatively, if the legislature so chooses, the employee can be forced to gamble by electing one form of recovery and thus precluding the other.[121]

117. *Serious and wilful misconduct: See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1022 (Supp. 1978) (common law remedy); CAL. LABOR CODE § 4553 (Supp. 1979) (50% increase with a maximum penalty of $10,000); MASS. ANN. CODE Ch. 152 § 28 (1958) (100% increase); TEX. CIV. STAT. Art. 8306 § 5 (1967) (common law action if gross or wilful conduct results in death). *Intentional conduct: See, e.g.*, ORE. REV. STAT. § 656.156 (1963) (common law remedy for excess amount over award); TEX. CIV. STAT. Art. 8306 § 5 (1967) (common law action); WASH. REV. CODE § 51.24.020 (1978) (common law remedy for excess amount over award); W. VA. CODE § 23-4-2 (1978) (common law remedy for excess amount over award); *Wilful failure to obey safety regulations: See, e.g.*, OHIO CONST. art. II, § 35 (15% to 50% increase in award at the discretion of industrial board); N.M. STAT. ANN. § 59-10-7 (1953) (10% increase); N.C. GEN. STAT. § 97-12 (1977) (10% increase); S.C. CODE § 72-157 (1962) (10% increase); UTAH CODE ANN. § 102.57 (1973) (15% increase); WIS. STAT. ANN. § 102.57 (1973) (15% increase).

118. *See* Garcia v. Gusmack Restaurant Corp., ___ App. Div. ___, 150 N.Y.S.2d 232 (1954); Le Pochat v. Pendleton, 271 App. Div. 964, 63 N.Y.S.2d 313 (1946).

119. *See* 2A LARSON *supra* note 1, § 70 at 13-56.

120. *Id.*

121. *Id.*

Under the percentage increase remedy, the size of the percent would of course depend upon legislative discretion. In other jurisdictions the increase ranges from ten to one-hundred percent with some programs employing a graduated scale of guaranteed compensation for the various forms of wilful conduct.[122] Whatever percentage increase schedule would be adopted, a common law action should be precluded by a legislative provision for increased benefits in order to prevent double recovery.

Although the common law remedy is the only means of attaining compensation truly commensurate with the seriousness of the injury, a percentage increase may adequately protect the interests of the employee by preserving the guarantee of prompt and reasonable compensation for industrial injuries. A common law action offers no guarantee of success. Even if the employee is allowed workmen's compensation when the common law action fails, attorney's fees and court expenses can amount to a substantial portion of the employee's compensation benefits. A percentage increase in the normal compensation benefits removes the expense of a common law action and at the same time relieves the courts of timely tort litigation. The employee is guaranteed compensation for his injury and the employer retains the protection from unlimited liability.

In addition to preserving the remedial nature of the Workmen's Compensation Act, the percentage increase remedy can provide a graduated scale of increases to account for variations in the degree of risk to the employee and the level of intent among the several forms of wilful conduct. Most jurisdictions which allow the employee a common law remedy for an employer's wilful conduct require a clear showing of the employer's intent to injure the employee.[123] As a result application of the remedy is often restricted

122. *See* note 117 *supra*.

123. Since the primary legal justification for allowing the employee a common law action is the non-accidental nature of wilful injury, most jurisdictions require a specific intent to injure the employee. *Compare* Hagger v. Wortz Biscuit Co., 210 Ark. 318, 196 S.W.2d 1 (1946), *with* Heskett v. Fisher Laundry & Cleaners Co., 217 Ark. 350, 230 S.W.2d 28 (1950). *See also* Southern Wire & Iron Co. v. Fowler, 217 Ga. 727, 124 S.E.2d 738 (1962); Duncan v. Perry Packing Co., 162 Kan. 79, 174 P.2d 78 (1946); Kenner v. Hanreco, 161 So. 2d 142 (La. App. 1964); Kennecott Copper Corp. v. Reyers, 75 Nev. 212, 337 P.2d 624 (1959); Wilkinson v. Achber, 101 N.H. 7, 131 A.2d 646 (1969). This effectively limits the scope of deterrent measures to intentional assault and battery. However, in considering either a common law remedy or a percentage increase in compensation, the Indiana Legislature should examine both wilful misconduct and an intentional assault and battery in light of the risk each presents to the employee.

Indiana courts have defined an employee's wilful misconduct as intentional

to intentional assaults in which the intent is specific and often self-evident. The percentage increase option can avoid this question of intent by examining the various forms of wilful conduct in light of the risk each presents to the employee. If society considers an intentional assault more malicious or more likely to cause injury than wilful and wanton misconduct or wilful violation of a statutory duty, then the legislature can introduce separate percentage increase levels for each. In this manner the percentage increase remedy can widen the deterrent effects of the Act to include forms of wilful conduct which consists of either a general or a specific intent to disregard the safety of the employee.

Whether it is the function of the legislature to enact an increased compensation provision or the function of the judiciary to grant the employee a common law remedy is a matter for the constitutional philosopher. Although the Indiana judiciary has acted responsibly with its laissez-faire policy, the courts should recognize that limits must often be placed on the legislature's freedom not to act. The judiciary must balance the benefits of its hands-off approach and the separation of powers against the rights of the employee. In the context of non-action by the legislature for over fifty years, there is little question that judicial as well as legislative action is far overdue.

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disobedience, conduct quasi-criminal in nature, and deliberate purpose. *See e.g.*, Northern Indiana Gas & Electric Co. v. Pietzvak, 69 Ind. App. 24, 118 N.E. 132 (1917); American Steel Foundries v. Fisher, 106 Ind. App. 25, 17 N.E.2d 840 (1938). In view of these characteristics, it is arguable that the "accident" condition can no more be applied to an employer's wilful misconduct than to an intentional assault and battery. Neither is unexpected nor without design, and both involve intentional conduct. Any distinction between general and specific intent does not reflect the fact that in each case the employer is intentionally and directly disregarding the safety of the employee.

Common sense suggests that an intentional battery presents a greater risk to the employee than wilful and wanton misconduct. Yet the characteristics of wilful misconduct and an intentional disregard for the safety of the employee suggests otherwise. As intentional battery is most likely aimed at one employee, while the wilful disregard of a known hazard may threaten many lives indiscriminately. The risk to the employee created by wilful and wanton misconduct is often undirected and involves a level of premeditation concerning the degree and likelihood of danger not present in an impulsive yet intentional battery.

In order to justify a blanket distinction in the Workmen's Compensation Act between an intentional battery and an intentional disregard for safety, the legislature and the judiciary should be able to show that the distinction is great enough to categorize wilful misconduct with negligence. In keeping with the humanitarian principles of the Act and the legislative intent to benefit the employee, this will be difficult indeed.

CONCLUSION

The Indiana Legislative enacted the Workmen's Compensation Act as a remedial measure, intending to correct the injustice which characterized the common law treatment of industrial injuries. It was designed to provide the employee with reasonable compensation for his injury and to promote safety within the industrial setting. Nevertheless, judicial application of the Act has in effect condoned conduct of the employer which presents the greatest risk of injury to the employee.

Under present judicial interpretation of the Act, the employer may wilfully injure his employee without fear of economic loss other than minimal administrative penalties and a potential increase in insurance premiums. Without economic incentive it is naive to expect the employer to share the concern of the employee for safety in the workplace. Judicial treatment of the employer's wilful conduct has been both contrary to the promotion of safety and in derogation of the same humanitarian aspects of the Act which are often utilized by the judiciary as justification for its decisions in the context of non-wilful injuries.

To rectify this inequity, the courts need to grant the employee the option of pursuing a common law remedy where he is wilfully injured by his employer within the scope of his employment. In fact the judiciary need not usurp legislative power and function because judicial interpretation of the Act as an exclusive remedy has abrogated common law remedies in the wilful injury context. It is the judiciary's inconsistent construction and misinterpretation which has tipped the sensitive balance of rights and remedies under the Act in favor of the employer. Correction of these mistakes may, but need not, occur solely by legislative mandate.

This is not to say that correction of the inequities which exist under present application of the Act is solely a problem for the judiciary. Although it is fully within the power of the courts to allow the employee a common law remedy against the employer, the problems can be just as easily and perhaps more efficiently corrected by the legislature. Unlike the judiciary the legislature can utilize greater innovation by enacting such provisions as the increased percentage in compensation for wilfully caused injury.

It matters little which branch of the government restores the balance and humanitarian nature of the Act. What is important is that the employer be deterred from freely and wilfully injuring the

employee without fear of consequence. For either the judiciary or the legislature to disregard the unique nature of an employer's wilful conduct is to make a mockery of the workmen's compensation system.

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