Washington and Lee Law Review

Volume 36 | Issue 1 Article 7

Winter 1-1-1979

Employer Liability In West Virginia: Compensation Beyond The Law

EMPLOYER LIABILITY IN WEST VIRGINIA: COMPENSATION BEYOND THE LAW

Society's dissatisfaction with common law remedies available to employee victims of industrial accidents prompted states to enact workmen's compensation statutes early in this century.[1] These statutes typically provided a guaranteed recovery to employees injured in work-related accidents regardless of fault.[2] In exchange for these payments, state legislatures granted employers a limited immunity from suit by employees for damages based on those injuries.[3] The West Virginia Legislature enacted

---

[1] At common law, employees could recover compensation for injuries only by prosecuting tort actions against their employers. *See* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, §2.20 (1978) [hereinafter cited as LARSON]; W. PROSSER, THE LAW OF TORTS, §80 at 526 (4th ed. 1971) [hereinafter cited as PROSSER]. Employees obtained recoveries only when they could establish employer negligence or fault. *See* Manolidis v. Elkins Indus., Inc. ___ W. Va. ___, 246 S.E.2d 907, 910-11 (1978); 1 LARSON, *supra* at § 2.20; PROSSER, *supra* § 80 at 527-28. The five common law duties owed by an employer to his employees are (1) to provide and maintain a reasonably safe place to work, (2) to provide and maintain safe appliances, tools and equipment, (3) to provide a sufficient number of suitable and competent fellow employees for safe performance of work, (4) to warn employees of any unusual hazards, and (5) to create and enforce safety rules. These limitations on employer duties, coupled with the defenses of the fellow-servant rule, assumption of risk, and contributory negligence, presented formidable barriers to recovery. *See generally* 1 LARSON, *supra* at §§ 4.00, .30; PROSSER, *supra* § 80 at 526. For an analysis of the transition in England from a fault-based compensation system to strict liability, see McMahon, *The Reactions of Tortious Liability To The Industrial Revolution,* 3 IR. JUR. 18,284 (1968).

Several states adopted workmen's compensation statutes shortly after the turn of this century so that by 1920, all but eight states had adopted a compensation system. For detailed accounts of the early developments in workmen's compensation law, see Larson, *The Nature And Origins of Workmen's Compensation,* 37 CORNELL L.Q. 206 (1952); Rhodes, *Inception Of Workmen's Compensation In The United States,* 11 ME. L. REV. 35 (1917).

[2] Although employees generally receive compensation payments for accidental injuries sustained in the course of employment, no compensation is available in some jurisdictions where the employee intends to injure himself or deliberately and intentionally violates certain safety statutes. *See, e.g.,* ALA. CODE tit. 25, § 25-5-51 (1975); CAL. LAB. CODE § 5705(c) (West 1971); VA. CODE § 65.1-38(1) (1973); W. VA. CODE § 23-4-2 (1978). Statutory recoveries under compensation programs generally are considerably lower than similar tort awards, with compensation primarily limited to medical expenses and a percentage of lost earnings. *See generally* 2 LARSON, *supra* note 1, at §§ 57-62.

The cost of workmen's compensation payments fall upon the participating employers. Although commentators generally state that consumers bear the costs of such programs when employers set prices for their products, traditional economic analysis suggests that employers bear at least a portion of these costs. *See* PROSSER, supra note 1, § 80, at 531. Statutory imposition of workmen's compensation systems on an employer may be likened to a tax upon that employer because both actions increase the cost of production without increasing productivity. Increased prices charged by the businesses for goods and services reflect the increased compensation costs. These increased prices will result in a lower level of consumption by the public according to the principles of supply and demand. To the extent that the decreased consumption results in a decreased marginal revenue, the employer has suffered a loss due to the compensation payments. *See* R. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE, 396-411 (1973); D. NETZER, ECONOMICS OF THE PROPERTY TAX, 32-40 (1966).

[3] In exchange for participation in the state workmen's compensation systems, state legislatures generally provide a limited immunity from common law actions to employers. *See,*

such a compensation plan,[4] but precluded employers from invoking the protection of statutory immunity from suit where injury or death results to an employee from the employer's "deliberate intention".[5] The Supreme Court of Appeals of West Virginia recently reviewed and subsequently redefined the deliberate intent exception to the statutory grant of employer immunity in three cases consolidated for argument and decision: *Manolidis v. Elkins Industries, Inc.*, *Snodgrass v. United States Steel Corp.*, and *Dishmon v. Eastern Associated Coal Corp.*[6]

In *Manolidis v. Elkins Industries, Inc.*, the plaintiff was injured in the defendant's manufacturing plant while operating a table saw which was

---

e.g., CAL. LAB. CODE § 3601 (West Cum. Supp. 1978); MO. ANN. STAT. § 287.120 (Vernon Cum. Supp. 1978); N.M. STAT. ANN. §59-10-5 (1974); N.C. GEN. STAT. §97-10.1 (Cum. Supp. 1977); OHIO REV. CODE ANN. § 4123.74 (Page 1973); W. VA. CODE § 23-2-6 (1978). A number of state statutory schemes provide some penalty where an employer's misconduct results in an employee's injury. Some states impose additional percentages of the workmen's compensation awards as penalties for an employer's violation of safety regulations or other misconduct. *See, e.g.*, CAL. LAB. CODE § 4553 (West Cum. Supp. 1978); KY. REV. STAT. §342.165 (1977); MASS. GEN. LAWS ANN. ch. 152, § 28 (West 1958); MO. ANN. STAT. § 287.120(4) (Vernon Cum. Supp. 1978); N.M. STAT. ANN., § 59-10-7(B) (1974); N.C. GEN. STAT. § 97-12 (Cum. Supp. 1977); OHIO CONST. art. II, § 35 (Page 1955); S. C. CODE § 42-9-70 (1976); UTAH CODE ANN. § 35-1-12 (1974); WIS. STAT. ANN. § 102.57 (West 1973). Arizona workmen's compensation statutes withdraw an employer's limited immunity when an employee is injured through his employer's willful misconduct. ARIZ. REV. STAT. ANN. § 23-1022 (Cum. Supp. 1977). Statutes in Oregon, West Virginia and Washington permit common law actions on behalf of an injured employee when the employer deliberately intends to cause injury to the employee and thus fully withdraw the grant of employer immunity. OR. REV. STAT. § 656.156(2) (1977); WASH. REV. CODE ANN. § 51.24.020 (Cum. Supp. 1977); W. VA. CODE § 23-4-2 (1978). Texas withdraws an employer's statutory immunity only where the employer's willful misconduct or gross negligence results in an employee's death. TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967).

[4] The West Virginia workmen's compensation statutes provide a limited immunity from employee tort suits to qualified employers participating in the state's workmen's compensation program. W. VA. CODE § 23-2-6 (1978). These statutes also extend this limited immunity to every officer, manager, agent, representative or employee of the employer while acting in furtherance of the employer's business interests. W. VA. CODE § 23-2-6a (1978).

[5] W. VA. CODE § 23-4-2 (1978). The West Virginia workmen's compensation statutes withdraw the grant of immunity where the employer deliberately intends to cause injury to an employee. *Id.* Section 23-4-2 states in relevant part:

> If injury or death result to any employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter.

Although the provision permits an employee to maintain a common law action against the employer, the statute also permits the employee to receive any workmen's compensation benefits to which he is entitled.

[6] ___ W. Va. ___, 246 S.E.2d 907 (1978). Justice McGraw inadvertantly misspelled throughout the court's opinion the name of the plaintiff as "Mandolidis". See Brief on Behalf of James Manolidis and June Manolidis, Plaintiffs in Error, Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907 (1978) [hereinafter cited as Manolidis Brief]. Justices Neely and Miller also adopted the misspelling in their opinions. This author will adhere to the proper spelling.

not equipped with a safety guard.[7] The plaintiff alleged that the defendant's failure to provide a safety guard for the saw constituted violations of both federal and state safety regulations[8] and that the employer had actual knowledge of the consequences of such an omission due to prior employee injuries of a similar nature.[9] The plaintiff also maintained that, although federal safety inspectors had withdrawn the saw from operation for lack of a proper safety guard, the employer had ordered workers to operate the saw without a guard to improve efficiency and thereby increase production and profits. Shortly after the employer's order, the plaintiff's injury resulted.[10]

In *Snodgrass v. United States Steel Corp.*, several employees sustained serious injuries and one employee died when a temporary building platform used in the construction of a bridge collapsed. The platform was dislodged from its supports when a heavy wire cable was dragged across it, causing both the platform and the employees working on the platform to fall into a gorge below.[11] The plaintiffs in *Snodgrass* alleged that their employer negligently and willfully violated certain safety regulations regarding the construction of such temporary platforms and failed to provide adequate safety precautions for employees working on the platform.[12]

In *Dishmon v. Eastern Associated Coal Corp.*, the plaintiff's decedent

---

[7] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 914 (1978).

[8] *Id.* at ___, 246 S.E.2d at 914-15; Manolidis Brief, *supra* note 6, at 17.

[9] Manolidis alleged that the defendant had actual knowledge of the likely consequences of the omission of the safety guard from the table saw because several other employees, including plaintiff's son, previously had injured themselves while working with such unguarded saws in the defendant's plant. Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 914-15 (1978); Manolidis Brief, *supra* note 6, at 19-20.

[10] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 914-15 (1978). Manolidis contended that his employer threatened to fire him if he refused to operate the unguarded saw. *Id.* at ___, 246 S.E.2d at 914-15; Manolidis Brief, *supra* note 6, at 5. The plaintiff demonstrated his employer's knowledge of the unreasonably dangerous condition of the saw through depositions showing repeated complaints by union shop stewards and safety inspectors about the unguarded saws. ___ W. Va. ___, 246 S.E.2d 907, 914-16; Manolidis Brief, *supra* note 6, at 20.

[11] A group of employees, and the wife of one deceased employee, brought the *Snodgrass* action against the American Bridge Division of United States Steel Corp. The company built a work-platform across a gorge to facilitate the construction of a bridge. One of the employees of the defendant accidently dislodged the platform with a heavy wire cable while operating a crane, sending the employees falling into the gorge. Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 916 (1978); Brief, Appeal From the Circuit Court of Kanawha County, West Virginia, at 2-3, Snodgrass v. United States Steel Corp., ___ W. Va. ___, 246 S.E.2d 907 (1978) [hereinafter cited as Snodgrass Brief]; Brief of Appellee United States Steel Corp., at 4, Snodgrass v. United States Steel Corp., ___ W. Va. ___, 246 S.E.2d 907 (1978) [hereinafter cited as U.S. Steel Brief].

[12] The plaintiffs in *Snodgrass* alleged that the defendant willfully violated certain safety regulations governing the construction of temporary work-platforms and, therefore, rendered the platforms patently dangerous. Additionally, the plaintiffs alleged that the company violated numerous regulations by failing to provide safety nets and lifelines on the platform. These willful safety violations, the plaintiffs argued, constituted deliberate intent to injure within the meaning of W. VA. CODE § 23-4-2 (1978). Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 916-17 (1978); Snodgrass Brief, *supra* note 11, at 3-5.

was killed while working in a mine when a portion of the slate ceiling and a roof support fell and crushed him.[13] In her wrongful death action, the plaintiff alleged that the defendant had deliberately violated certain mine safety regulations concerning roof supports and underground blasting.[14] Furthermore, the plaintiff contended that the employer deliberately, willfully, and wantonly permitted its employees to work under extremely hazardous conditions and that the employer's misconduct was the proximate cause of her decedent's death.[15]

The plaintiffs in all three cases maintained that their employers had deliberately intended to injure the employees[16] and, therefore, were precluded from invoking the limited immunity granted to employers by state workmen's compensation statutes.[17] In each case, the trial court had dismissed the action on the pleadings, finding that the plaintiffs could not demonstrate the deliberate intent necessary to defeat the employers' immunity.[18] The Supreme Court of Appeals of West Virginia reversed the decisions and remanded the cases to permit the plaintiffs to establish deliberate intent at trial.[19] The Supreme Court held that where genuine issues of fact exist and a liberal reading of the complaint states a basis for relief, the West Virginia Rules of Civil Procedure forbid pre-trial disposition of an action.[20] In each of the three cases, the court found that the

---

[13] The defendant coal company in *Dishmon* allegedly used explosives illegally to clear a rock fall in one of its mines. Shortly after the explosions, the plaintiff's decedent was sent to work in clearing the area. Soon thereafter, one of the rib roof supports fell into the area, killing the decedent and two others. ___ W. Va. ___, 246 S.E.2d at 919; Brief on Behalf of Appellant, at 1-2, Dishmon v. Eastern Associated Coal Corp., ___ W. Va. ___, 246 S.E.2d 907 (1978) [hereinafter cited as Dishmon Brief]; Brief on Behalf of Eastern Associated Coal Corp., Appellee, at 4, Dishmon v. Eastern Associated Coal Corp., ___ W. Va. ___, 246 S.E.2d 907 (1978) [hereinafter cited as Eastern Coal Brief].

[14] ___ W. Va. ___, 246 S.E.2d at 919-20; Dishmon Brief, *supra* note 13, at 2-3, 16-21; Eastern Coal Brief, *supra* note 13, at 5.

[15] ___ W. Va. ___, 246 S.E.2d at 919-20. Although the plaintiff in *Dishmon* alleged willful and deliberate violations of several federal and state safety regulations, she made no argument that such violations were deliberately intended to cause injury or death to the employees. Eastern Coal Brief, *supra* note 13, at 5-6. On appeal, the *Manolidis* court held that this omission did not render the plaintiff's complaint defective because a fair reading of the complaint implied an allegation of deliberate intent. ___ W. Va. ___, 246 S.E.2d at 920.

[16] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 910 (1978).

[17] *See* text accompanying note 5 *supra*.

[18] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 916, 917, 920 (1978).

[19] *Id.* at ___, 246 S.E.2d at 918-21.

[20] In *Manolidis* and *Snodgrass*, the trial courts' consideration of affidavits and depositions submitted in support of the defendants' motions to dismiss converted those motions into motions for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 917 (1978); *see* Wilfong v. Wilfong, 156 W. Va. 754, 756, 197 S.E.2d 96, 98 (1973). Since the plaintiff's allegations presented genuine issues of fact concerning the employers' alleged deliberate intent to injure, the *Manolidis* court held on appeal that disposition of *Manolidis* and *Snodgrass* by summary judgment was inappropriate. ___ W. Va. ___, 246 S.E.2d at 918-19. The *Manolidis* court stated that the employees in both cases must have an opportunity to present evidence at trial which would support an inference of deliberate intent. *Id.*

The *Manolidis* court viewed the defendant's motion to dismiss in *Dishmon* as a motion

plaintiffs adequately alleged that the employers had deliberately intended to injure the employees.[21] The *Manolidis* court held that the statutory grant of immunity did not interfere with a plaintiff's right to establish evidence of an employer's intent at trial.[22] Therefore, the immunity provision does not operate to protect an employer from suit, but merely protects him from adverse judgments where deliberate intent is not established at trial.[23]

The *Manolidis* court not only remanded the three cases on procedural grounds, but also substantively redefined the deliberate intent language of the employer immunity exception.[24] The court held that an employer loses statutory immunity from common law liability when his conduct constitutes an intentional tort or willful, wanton, and reckless misconduct.[25]

---

pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure. ___ W. Va. ___, 246 S.E.2d at 920. The Rule states that a court should construe pleadings to achieve substantial justice. W. VA. R. CIV. P. 8. Therefore, where a liberal reading of the complaint discloses a ground for relief, a court should not dismiss the suit. *See* Conley v. Gibson, 355 U.S. 41, 45-48 (1957); Williams v. Wheeling Steel Corp., 266 F. Supp. 651, 654 (N.D. W. Va. 1967); Manolidis v. Elkins Indus. Inc., ___ W. Va. ___, 246 S.E.2d 907, 920 (1978); Chapman v. Kane Transfer Co., ___ W. Va. ___, 236 S.E.2d 207, 212 (1977). Since the plaintiff in *Dishmon* could establish deliberate intent at trial through proof of the employer's willful misconduct, the *Manolidis* court found that the trial court improperly dismissed the *Dishmon* suit on the pleadings alone. Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 921 (1978).

[21] *See* note 20 *supra.*

[22] Prior to *Manolidis,* courts construed the immunity provisions of West Virginia's workmen's compensation statutes as requiring a trial court to screen common law actions against employers where the plaintiff's affidavits and depositions did not establish the employer's deliberate intent to injure the employee. *See* Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 923-24 (1978) (Neely, J., dissenting); Eisnaugle v. Booth, ___ W. Va. ___, 226 S.E.2d 259, 260 (1976); Brewer v. Appalachian Constr., Inc., 135 W. Va. 739, 748, 65 S.E.2d 87, 93 (1951); Allen v. Raleigh-Wyoming Mining Co., 117 W. Va. 631, 637, 186 S.E. 612, 614 (1936); Maynard v. Island Creek Coal Co., 115 W. Va. 249, 250-51, 175 S.E. 70, 71 (1934); Collins v. Dravo Contracting Co., 114 W. Va. 229, 236, 171 S.E. 757, 759-60 (1933).

[23] The *Manolidis* court construed the West Virginia workmen's compensation statute, which provides employers with a limited immunity, as effectively making the qualifying employer judgment-proof. Section 23-2-6 of the West Virginia Code states in relevant part:

> Any employer subject to this chapter who shall subscribe and pay into the workmen's compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided, shall not be liable to respond in damages at common law or by statute for the injury or death of an employee, however occurring. . . .

Although an employer is not liable in damages for accidental injuries to an employee by virtue of this section, the *Manolidis* court held that this statute did not operate to protect an employer from the litigation process itself when a plaintiff alleges deliberate intent under W. VA. CODE § 23-4-2 (1978). Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 918-19, 921 (1978). *See generally* notes 4 & 5 *supra; see also* Note, *Workmen's Compensation—The Deliberate Intent Statute: Providing For The Victims of Industry?,* 72 W. VA. L. REV. 90 (1970) [hereinafter cited as *Providing For The Victims?*].

[24] *See* ___ W. Va. ___, 246 S.E.2d at 910-14. *But see id.* at ___, 246 S.E.2d at 926, (Miller, J., concurring). Justice Miller did not believe that the court redefined the construction of the immunity statute in *Manolidis.*

[25] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 914 (1978).

Although prior constructions of the statutory language had required proof of an employer's specific intent to injure an employee,[26] the *Manolidis* court rejected such a reading of the statute. The court held that where an employer acts with a knowledge or consciousness that his conduct creates a substantial risk of bodily injury, the employer may not invoke the statutory immunity to protect himself from employee suits.[27] Furthermore, the court noted that such knowledge may be shown by an employer's familiarity with relevant safety regulations and evidence of prior injuries or deaths resulting from the employer's conduct.[28] Finally, the *Manolidis* court suggested that the fact-finder, rather than the trial judge, should determine the culpability of an employer's conduct.[29]

The Supreme Court of Appeals of West Virginia first attempted to define the deliberate intent language which limits employer immunity in *Collins v. Dravo Contracting Co.*[30] Although the *Collins* court failed to adopt a specific construction of "deliberate intent",[31] the court did note that the term might encompass an employer's failure to perform a legal duty in addition to an affirmative act.[32] Thus, the court announced that when a plaintiff alleges that his employer deliberately intended to cause an injury through an omission, the plaintiff may introduce evidence of the employer's intent at trial.[33] Less than one year after *Collins*, the court reconsidered the deliberate intent provision in *Maynard v. Island Creek Coal Co.*[34] Although the *Maynard* court also declined to define deliberate intent,[35] the court rejected the plaintiff's contention that gross negligence alone is sufficient to establish an employer's deliberate intent and thereby expose the employer to common law liability for employee injuries.[36] The

---

[26] *See* text accompanying notes 39-41, 49-50 *infra*.

[27] Manolidis v. Elkins Indus. Inc., ___ W. Va. ___, 246 S.E.2d 907, 914 (1978).

[28] *Id.* at ___, 246 S.E.2d at 914 n.10.

[29] The *Manolidis* court implied that a jury ultimately should determine the culpability of an employer's conduct in deciding whether the employer acted with a deliberate intention to injure. The court interpreted two prior decisions, Collins v. Dravo Contracting Co., 114 W. Va. 229, 171 S.E. 757 (1933) and Maynard v. Island Creek Coal Co., 115 W. Va. 249, 175 S.E. 70 (1934), as clearly endorsing such a delegation to the jury. Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 912 (1978). While altering the specific intent construction developed in Allen v. Raleigh-Wyoming Mining Co., 117 W. Va. 631, 186 S.E. 612 (1936), the *Manolidis* court explicitly affirmed the interpretations placed on the statutory language by the *Collins* and *Maynard* courts. ___ W. Va. ___, 246 S.E.2d at 913.

[30] 114 W. Va. 229, 171 S.E. 757 (1933); *see* text accompanying notes 56-63 *infra*.

[31] The *Collins* court reviewed several definitions of intent without applying any single definition to the deliberate intent language which governs employer liability. The court noted that a man might be presumed to intend the ordinary and usual consequences of his actions but pointed out that other definitions of intent require the existence of actual malice. *Id.* at 234, 171 S.E. at 759.

[32] *Id.*, 171 S.E. at 759.

[33] *Id.*, 171 S.E. at 759.

[34] 115 W. Va. 249, 175 S.E. 70 (1934); *see* text accompanying notes 64-72 *infra*.

[35] Rather than adopting any definition of deliberate intent, the *Maynard* court devoted much of its opinion to outlining conduct beyond the scope of the statutory language, such as gross negligence. 115 W. Va. at 252-53, 175 S.E. at 72. *See also* text accompanying notes 64-72 *infra*.

court did acknowledge, however, that extremely wanton or reckless misconduct by an employer might warrant a finding of the requisite intent where the employee's injury flows naturally from the employer's misconduct.[37] Nevertheless, the *Maynard* court placed a heavy burden on plaintiffs by requiring "clear and forceful" evidence to support such a finding.[38] In *Allen v. Raleigh-Wyoming Mining Co.*,[39] the court defined the deliberate intent language for the first time and held that an employer loses his statutory immunity only when he specifically intends to injure an employee, and injury in fact results.[40] The specific intent construction developed in *Allen* thus required courts to focus on the employer's underlying intent rather than merely on his conduct.[41]

The *Manolidis* court's construction of the statute rejects the specific

---

[37] The *Maynard* court stated that under some circumstances a trial court might imply the requisite intent from the employer's conduct. The *Maynard* court stated:

> It may be that the carelessness, indifference and negligence of an employer may be so wanton as to warrant a judicial determination that his ulterior intent was to inflict injury. But in the very nature of things, a showing which would warrant such a finding would have to be clear and forceful in high degree.

115 W. Va. at 253, 175 S.E. at 72. Thus, the *Maynard* court limited the cases in which a trial court might imply intent to particularly egregious employer misconduct. The plaintiff carried a heavy burden in making such a showing, as the evidentiary standard imposed by the court was severe.

[38] *See* note 37 *supra.*

[39] 117 W. Va. 631, 186 S.E. 612 (1936). The plaintiff in *Allen* was injured while riding into a coal mine on a train of empty coal cars. As the train passed into the mine, the plaintiff was struck by a trap door recently installed over the tracks. The plaintiff contended that because the defendant had knowledge of the dangerous location of the trap door, but failed to take any precautions other than warning the plaintiff of the door's existence, the injury resulted from the employer's deliberate intent. *Id.* at 632-33, 186 S.E. at 612.

[40] *Id.* at 632-33, 186 S.E. at 612. The *Allen* court relied heavily on the judicial interpretations of similar deliberate intent statutes in Oregon and Washington in construing W. VA. CODE § 23-4-2 (1978). WASH. REV. CODE ANN. § 51.24.020 (Cum. Supp. 1977). OR. REV. STAT. § 656.156 (1977).

The *Allen* court expressly adopted the definition of deliberate intent developed in Jenkins v. Carman Mfg. Co., 79 Or. 448, 155 P. 703 (1916). The plaintiff in *Jenkins* was injured when a defective piece of machinery in the defendant's sawmill hurled some lumber which struck the plaintiff. The plaintiff alleged that the defendant had knowledge of the defect in the machine and recognized the potential danger to employees but failed to repair or replace the equipment. The employee contended that the defendant's conduct constituted deliberate intent to injure within the meaning of the Oregon immunity statute. *Id.* at 449-50, 155 P. at 704. The *Jenkins* court, however, construed the statute to include only those employee injuries caused by an employer's specific intent to produce such an injury. The court stated:

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

Id. at 453-54, 155 P. at 705. The justification behind the imposition of a specific intent standard in construing the immunity statutes is the non-accidental nature of an employee's injury as a critical element of a common-law tort action. Therefore, an employer should not forfeit statutory immunity from suits where accidental injuries to employees are caused by the employer's gross negligence or willful and wanton misconduct. *See generally* 2A LARSON, *supra* note 1, at § 68.13; *Providing For The Victims?*, *supra* note 23, at 96.

[41] *See* note 40 *supra.*

intent requirement established in *Allen*[42] and directly conflicts with the intent of the West Virginia Legislature.[43] On review of the statute, the court failed to apply three principles of statutory construction which aid a court in ascertaining and implementing legislative intent. First, where the language of a statute is clear and unambiguous, a court should give effect to that language.[44] The phrase "deliberate intent to injure" denotes a specific intent to produce injury and focuses on the employer's state of mind rather than his conduct,[45] a focus dispensed with in *Manolidis*. Second, when a legislature adopts a statute from another jurisdiction, the construction given by that jurisdiction normally will control.[46] Washington adopted a provision in its first workmen's compensation act[47] on which West Virginia and several other states patterned their employer immunity statutes.[48] Jurisdictions which have construed the deliberate intent language consistently have required a showing of specific intent to injure before withdrawing an employer's immunity.[49] The Supreme Court of Appeals of West Virginia itself adopted a specific intent construction of the statute in *Allen* and applied that construction repeatedly for over forty years.[50]

---

[42] *See* text accompanying notes 49-50 *infra*.

[43] *See* text accompanying notes 44-53 *infra*.

[44] A court's purpose in construing a statute is to give effect to the will of the legislature. *See, e.g.*, Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 910 (1978); Vest v. Cobb, 138 W. Va. 660, 684, 76 S.E.2d 885, 898 (1953); Richardson v. State Comp. Comm'r, 137 W. Va. 819, 834, 74 S.E.2d 258, 261 (1953); State *ex. rel.* Cosner v. See, 129 W. Va. 722, 743, 42 S.E.2d 31, 43 (1947); State *ex rel.* Lawhead v. Kanawha County Court, 129 W. Va. 167, 172, 38 S.E.2d 879, 900 (1946); McVey v. Chesapeake & Potomac Tel. Co., 103 W. Va. 519, 523, 138 S.E. 97, 98 (1927); 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, § 45.05 (4th ed. 1973) [hereinafter cited as *Sutherland*]. Where the language of a statute is clear and unambiguous, a court should give effect to that language. *See, e.g.*, State *ex rel.* Fox v. Board of Trustees of Policemen's Pension or Relief Fund, 148 W. Va. 369, 373-74, 135 S.E.2d 262, 264-65 (1964); State *ex. rel.* Hardesty v. Aracoma-Chief Logan No. 4253, V.F.W., 147 W. Va. 645, 649-50, 129 S.E.2d 921, 924 (1963); State v. Chittester, 139 W. Va. 268, 272, 79 S.E.2d 845, 846-47 (1954); Barnhart v. State Comp. Comm'r, 128 W. Va. 29, 32, 35 S.E.2d 686, 687 (1945); 2A SUTHERLAND, *supra* at §§ 46.01, .04.

[45] Allen v. Raleigh-Wyoming Mining Co., 117 W. Va. 631, 632-33, 186 S.E. 612, 612-13 (1936); Brief as Amicus Curiae of the West Virginia Farm Bureau, at 13-14, Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907 (1978) [hereinafter cited as Farm Bureau Brief]; Brief as Amicus Curiae of the West Virginia Mfrs. Ass'n Opposing the Position of Appellants, at 6, Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907 (1978) [hereinafter cited as West Virginia Mfrs. Ass'n Brief]; United States Steel Brief, *supra* note 11, at 18-19; Eastern Coal Brief, *supra* note 13, at 24-25.

[46] *See, e.g.*, State *ex rel.* Wadsworth v. Southern Surety Co., 221 Ala. 113, ___, 127 So. 805, 810 (1930); Duval v. Hunt, 34 Fla. 85, ___, 15 So. 876, 882 (1894); Todd v. State, 228 Ga. 746, ___, 187 S.E.2d 831, 834 (1972); Saint Joseph Hosp. v. Quinn, 241 Md. 371, ___, 216 A.2d 732, 735 (1966); Piatkowski v. Mok, 29 Mich. App. 426, ___, 185 N.W.2d 413, 414 n.1 (1971); General Acc'd Fire & Life Ins. Corp. v. Cohen, 203 Va. 810, 813, 127 S.E.2d 399, 401 (1962). *See generally* Allen v. Raleigh-Wyoming Mining Co., 117 W. Va. 631, 186 S.E. 612 (1936); 2A SUTHERLAND, *supra* note 44, at § 52.02.

[47] WASH. REV. CODE ANN. § 51.24.020 (Cum. Supp. 1977).

[48] *See* note 40 *supra*.

[49] *See, e.g.*, Jenkins v. Carman Mfg. Co., 79 Or. 448, 453-54, 155 P. 703, 705 (1916); Delthony v. Standard Furn. Co., 205 P. 379, 379-80 (Wash. 1922). *See also* note 86 *infra*.

[50] *See* Eisnaugle v. Booth, ___ W. Va. ___, 226 S.E.2d 259 (1976); Brewer v. Appa-

Third, when a statute has received practical application by the courts and subsequently is reenacted by the legislature, the contemporaneous application is presumptively correct.[51] The West Virginia Legislature reenacted the limited immunity provision without modification subsequent to *Allen* and thereby impliedly approved the court's construction of the deliberate intent language.[52] Furthermore, the legislature has rejected repeated attempts to amend the statute to provide expanded employer liability.[53] Such legislative attention serves to reinforce the past judicial constructions of the statutory language. Since the legislative intent underlying the statute is clear, the legislature itself should be the source of any change in the application of the deliberate intent exception to employer immunity.

In rejecting the *Allen* construction of deliberate intent despite the principle of stare decisis,[54] the *Manolidis* court placed great weight on both the

---

lachian Constr., Inc., 135 W. Va. 739, 65 S.E.2d 87 (1951); Allen v. Raleigh-Wyoming Mining Co., 117 W. Va. 631, 186 S.E. 612 (1936).

[51] State *ex rel.* Zirk v. Muntzing, 146 W. Va. 349, 357-58, 120 S.E.2d 260, 265 (1961); Parsons v. County Court of Roane County, 92 W. Va. 490, 497, 115 S.E. 473, 476 (1922); *accord,* Snyder v. Harris, 394 U.S. 332, 339 (1969); State v. McKenney, 268 Ala. 165, ____, 105 So.2d 439, 443 (1958); State *ex rel.* Auto. Mach. Co. v. Brown, 121 Ohio St. 73, ____, 166 N.E. 903, 904 (1929). *See generally* 2A SUTHERLAND, *supra* note 44, at § 49.09. Courts have held that a particular statutory construction may be reexamined to correct any errors in interpretation, even after subsequent reenactment by a legislature. *See, e.g.,* Boys Market, Inc., v. Retail Clerks, Local 770, 398 U.S. 235, 240-41 (1970); James v. United States, 366 U.S. 213, 220 (1961); Helvering v. Hallock, 309 U.S. 106, 119 (1940). *See generally* 46 COLUM. L. REV. 886 (1946); 31 MINN. L. REV. 625 (1947).

[52] *See* note 51 *supra.*

[53] The West Virginia Legislature repeatedly has considered and refused to enact legislation which would expand employer liability beyond the present workmen's compensation statute, W. VA. CODE § 23-4-2 (1978). One proposal, introduced in 1969, and again in 1970, would have denied employer immunity where an employee is injured as a result of the employer's willful, wanton, or reckless misconduct, or the employer's violation of any state safety statute or regulation. S. 30, 59th W. Va. Leg., 1st Reg. Sess. (1969); S. 7, 59th W. Va. Leg., 2nd Reg. Sess. (1970); H. 545, 59th W. Va. Leg., 2d Reg. Sess. (1970). A second series of proposals, introduced in 1973 and 1974, would have denied employer immunity when the employer's disregard of a known and preventable health or safety hazard causes injury to an employee. S. 213, 61st W. Va. Leg., 1st Reg. Sess. (1973); H. 1037, 61st W. Va. Leg., 1st Reg. Sess. (1973); S. 424, S. 487, S. 510, H. 1096, H. 1215, H. 1330, 61st W. Va. Leg., 2d Reg. Sess. (1974). In 1975 and 1976, several other legislative proposals would have established a presumption of an employer's deliberate intent to produce injury where an employer's violation of statutory, regulatory, or contractual safety provisions injures an employee. S. 435, H. 1189, 62nd W. Va. Leg., 2d Reg. Sess. (1976). Most recently, the legislature considered a proposal which would have denied employer immunity in any case where an employer's negligence causes injury to an employee. This proposal also limited the common law damages recoverable to the difference between the receivable disability payments and the employee's usual wages. H. 1522, 63rd W. Va. Leg., 1st Reg. Sess. (1977). *See generally* Eastern Coal Brief, *supra* note 13, at Appendix 1.

[54] The Supreme Court of Appeals of West Virginia demonstrated its lack of concern for the doctrine of stare decisis in a case involving trespass damages, Jarrett v. E. L. Harper & Son, Inc., ____ W. Va. ____, 235 S.E.2d 362 (1977). In *Jarrett,* the trespassing defendant company destroyed the plaintiff's water well while building a sewer for a public service district, leaving the plaintiff and his family without water for five weeks. *Id.* at ____, 235 S.E.2d at 363. Prior West Virginia decisions drew a distinction between permanent and

Collins and *Maynard* decisions.[55] The plaintiff's decedent in *Collins* was killed while working in an excavation under an overhanging earthen bank which suddenly collapsed and buried the decedent.[56] The plaintiff alleged that although the employer knew that the bank was likely to collapse, he failed to warn the decedent, sending the employee to work under the bank with the deliberate intent to cause injury.[57] Although the *Collins* court primarily addressed the issue of pleading a deliberate intent action against an employer,[58] the court also held that an employer may deliberately intend to injure an employee through an omission.[59] The *Collins* court, however, clearly focused on the employer's mental state at the time of the omission rather than on his conduct.[60] The court noted that the employer's foreman allegedly knew that the bank was about to collapse and, with that

---

temporary property damage in trespass actions before assessing and awarding consequential damages. *Compare* O'Dell v. McKenzie, 150 W. Va. 346, 350, 145 S.E.2d 388, 391 (1965), Jones v. Pennsylvania R.R., 138 W. Va. 191, 195-96, 75 S.E.2d 103, 105-6 (1953), *and* McHenry v. City of Parkersburg, 66 W. Va. 533, 535, 66 S.E. 750, 751 (1909) *with* Severt v. Beckley Coals, Inc., 153 W. Va. 600, 610-11, 170 S.E.2d 577, 583 (1969) *and* Malamphy v. Potomac Edison Co., 140 W. Va. 269, 279, 83 S.E.2d 755, 761 (1954). The plaintiff in *Jarrett*, however, sought damages not only for the cost of replacing the well, but also for his aggravation and inconvenience. Jarrett v. E. L. Harper & Son, Inc., ___ W. Va. ___, 235 S.E.2d 362, 365 (1977). The *Jarrett* court responded by over-ruling all prior cases which recognized such a distinction and held that the plaintiff could recover damages for aggravation and inconvenience notwithstanding the temporary nature of the proprty damage. *Id.* at ___, 235 S.E.2d at 365. Thus, the Supreme Court of Appeals of West Virginia does not appear to accord great persuasive power to the doctrine of stare decisis.

A distinction may be drawn in the application of stare decisis between matters of statutory interpretation and common law. The weight of stare decisis should be stronger in a case involving statutory interpretation than in a situation concerning common law. The courts themselves develop the common law, which is subject to reevaluation and alteration in light of society's changing circumstances. Where a court is construing a statute, however, the court should give effect to the will of the legislature. *See* note 44 *supra*. The changes in the substance of a statute generally should emanate from the legislature rather than the court. *See* Maynard v. Island Creek Coal Co., 115 W. Va. 249, 252, 175 S.E. 70, 72 (1934).

[55] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 911-12 (1978).

[56] Collins v. Dravo Contracting Co., 114 W. Va. 229, 230-31, 171 S.E. 757, 757 (1933).

[57] *Id.*, 171 S.E. at 757.

[58] The trial court in *Collins* dismissed the plaintiff's action because the pleadings failed to demonstrate the employer's deliberate intent to injure. On appeal, the court primarily addressed the procedural issue of the sufficiency of a pleading that alleges an employer's deliberate intent to injure an employee. *Id.* at 235, 171 S.E. at 759.

[59] *Id.* at 234, 171 S.E. at 759.

[60] The *Collins* court focused on the underlying specific intent of the employer rather than merely evaluating his conduct. The court stated:

> If the defendant permitted the conditions set forth in the declaration to exist; if they were conditions that would naturally result in injury or death to its employees, . . . if the defendant . . . knew full well that such conditions existed, then . . . we cannot see why the very conditions alleged . . . might not have been permitted to continue with the deliberate intent on the part of the employer, and with a design, that their continuance should cause injury or death or both to its employees.

Id. at 234-35, 171 S.E. at 757. Thus, the *Collins* court required more than mere misconduct to support a finding of deliberate intent. The court required some specific scheme to cut off employer immunity.

knowledge, sent the decedent to work under that bank.[61] The certain result of the foreman's act was the employee's death.[62] Since the employer's actions seemed certain to result in injury to an employee, the *Collins* court admitted such misconduct as evidence of the employer's underlying intent.[63]

In *Maynard,* the plaintiff also alleged that her decedent's death resulted from the employer's deliberate intention.[64] When making repairs on a coal conveyor, an employee of the defendant negligently failed to remove a protruding bolt near an opening of the conveyor.[65] While walking over a covered portion of the conveyor, the decedent stumbled on this bolt, fell into the conveyor, and was killed.[66] Although the plaintiff contended that the defendant acted willfully, deliberately, and unlawfully in permitting the conveyor to fall into disrepair,[67] the *Maynard* court found that the employer did not deliberately intend to injure the employee.[68] The court stated that under particularly egregious circumstances, an employer's conduct could be so wanton as to warrant a judicial determination of intent.[69] Nonetheless, the court focused primarily on the employer's mental state and noted that his conduct served only as evidence of the underlying intent.[70] Thus, the *Maynard* court ruled that "[t]he result of the [decedent's] stumbling was characterized by fortuitousness rather than by anticipated sequence" and, therefore, the employer's conduct was insufficient to support a finding of deliberate intent.[71] The *Maynard* court imposed a strict evidentiary standard by accepting an employer's conduct as indicative of his intent only where the injury flowed naturally from the misconduct.[72]

The *Manolidis* decision shifts the focus of the trial court from the employer's intent to his conduct. The *Manolidis* court held that where an

---

[61] *Id.* at 234-35, 171 S.E. at 757.

[62] *Id.*, 171 S.E. at 757.

[63] The court admitted the employer's misconduct in *Collins* as evidence of the underlying intent, but required additional evidence to support a finding of specific intent. *See id.* at 235, 171 S.E. at 757. *See also* note 60 *supra.*

[64] Maynard v. Island Creek Coal Co., 115 W. Va. 249, 251, 175 S.E. 70, 71 (1934).

[65] *Id.* at 250-51, 175 S.E. at 71.

[66] *Id.*, 175 S.E. at 71.

[67] *Id.*, 175 S.E. at 71.

[68] *Id.* at 253, 175 S.E. at 72.

[69] The *Maynard* court alluded to a set of circumstances in which an employer's misconduct might warrant a judicial finding of deliberate intent to injure. The court stated:

> It may be that the carelessness, indifference and negligence of an employer may be so wanton as to warrant a judicial determination that his ulterior intent was to inflict injury. But in the very nature of things, a showing which would warrant such a finding would have to be clear and forceful in high degree.

Id., 175 S.E. at 72. Thus, the *Maynard* court limited the circumstances in which a court may infer deliberate intent to certain special cases of egregious employer misconduct. The misconduct apparently must have reasonably certain and generally accepted consequences before a court could presume intent.

[70] *Id.*, 175 S.E. at 72.

[71] *Id.*, 175 S.E. at 72. *See also* note 69 *supra.*

[72] Maynard v. Island Creek Coal Co., 115 W. Va. 249, 253, 175 S.E. 70, 72 (1934).

employer deliberately engages in misconduct with the knowledge that his misconduct creates a substantial risk of injury to employees, the employer may not invoke the statutory immunity of the workmen's compensation statutes.[73] An employee may prove the employer's willful misconduct merely by showing that the employer deliberately violated state or federal safety regulations.[74] The *Manolidis* decision then requires that the fact-finder plunge into risk analysis to weigh the probability of employee injury resulting from the employer misconduct.[75] If the fact-finder determines that the violation created a "strong" probability of injury,[76] the employer may not invoke the statutory immunity and may be exposed to common law liability.[77] Under the *Manolidis* holding, a trial court need not evaluate an employer's specific intent to injure the employee. Rather, the deliberate violation of safety statutes coupled with an employer's knowledge of the probable consequences create liability.[78]

Although *Manolidis* certainly will increase the number of personal injury suits based on work-related injuries,[79] the extent to which the decision will actually expand employer liability is unclear. The court plainly indicated that an employer's willful violation of a safety statute alone will not warrant a recovery.[80] The court held that a plaintiff also must show that the employer's conduct created a great risk of injury.[81] In this regard, the only mitigating standard cited by the *Manolidis* court requires a "strong probability that injury may result" before imposing liability.[82] Nevertheless, the violation of a safety statute itself might raise a general presumption that injury is likely to result.[83] The extent to which employers will suffer adverse judgments, therefore, depends largely upon future judicial determinations of the actionable level of the risk of injury. By striking the specific intent requirement of the deliberate intent provision, the

---

[73] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 914 (1978).

[74] *See id.* at ___, 246 S.E.2d at 914 n.10.

[75] *Id.* at ___, 246 S.E.2d at 925 (Miller, J., concurring).

[76] *Id.* at ___, 246 S.E.2d at 914. The *Manolidis* court looked to the Second Restatement of Torts to establish the standard of liability in deliberate intent actions and elaborated that a plaintiff must show a greater probability of injury to establish deliberate intent than that necessary to prove negligence. *Id.* at ___, 246 S.E.2d at 914. *See also* PROSSER, *supra* note 1, § 500, Comment f. at 590.

[77] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 914 (1978).

[78] *Id.* at ___, 246 S.E.2d at 914. *See also* Stone v. Rudolph, 127 W. Va. 335, 346, 32 S.E.2d 742, 748 (1944).

[79] *See* Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 922-23 (1978) (Neely, J., dissenting). *But see id.* at ___, 246 S.E.2d at 926 (Miller, J., concurring).

[80] *Id.* at ___, 246 S.E.2d at 914.

[81] *Id.* at ___, 246 S.E.2d at 914.

[82] *Id.* at ___, 246 S.E.2d at 914. *See also* note 76 *supra.*

[83] Legislatures and regulatory agencies draft safety statutes to protect workers from industrial accidents. Deliberate violation of such provisions by employers presumptively indicates a willingness to risk employee injuries. Justice Neely, however, cogently pointed out that traditional common sense safety practices have become elaborate codifications of industrial safety practices. With the immense number of safety rules and regulations, virtually every accident involves some sort of safety violation. Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 922-23 (1978) (Neely, J., dissenting).

Manolidis court sought to subject a broader class of employer misconduct to judicial scrutiny and potential common law liability.[84] West Virginia employers may no longer risk employee injuries by cutting corners with safety regulations and invoke workmen's compensation immunity from common law actions by employees.[85]

By expanding the deliberate intent limitation on employer immunity, the *Manolidis* court rejected a statutory construction which had been judicially applied for over forty years.[86] While the court and legal commenta-

---

[84] Prior West Virginia decisions held that willful misconduct did not constitute deliberate intent within the meaning of W. VA. CODE § 23-4-2. *See* Eisnaugle v. Booth, ___ W. Va. ___, 226 S.E.2d 259, 261 (1976); Brewer v. Appalachian Constr., Inc., 135 W. Va. 739, 750, 65 S.E.2d 87, 94 (1951). Despite language to the contrary, Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 926 (1978) (Miller, J., concurring), the *Manolidis* decision may abolish any distinction between gross negligence and willful misconduct through the risk-analysis approach. Gross negligence consistently has been held insufficient to cut off an employer's statutory immunity. *See* Eisnaugle v. Booth, ___ W. Va. ___, 226 S.E.2d 259, 261 (1976); Brewer v. Appalachian Constr., Inc., 135 W. Va. 739, 750, 65 S.E.2d 87, 94 (1951); Allen v. Raleigh-Wyoming Mining Co., 117 W. Va. 631, 635-36, 186 S.E. 612, 614 (1936); Maynard v. Island Creek Coal Co., 115 W. Va. 249, 252, 175 S.E. 70, 72 (1934). An employer now may negligently violate a safety statute without specific intent to injure and face liability through a risk-analysis. *See* text accompanying notes 74-78 *supra*. Thus, in practice, the probability standard set forth in *Manolidis* may result in strict liability for employers who violate safety regulations.

[85] Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 913-14 (1978).

[86] West Virginia courts accepted and applied the *Allen* specific intent construction for over forty years. The court had two prior opportunities to modify the *Allen* construction yet declined to do so. Eisnaugle v. Booth, ___ W. Va. ___, 226 S.E.2d 259 (1976); Brewer v. Appalachian Constr., Inc., 135 W. Va. 739, 65 S.E.2d 87 (1951). Indeed, the *Brewer* and *Eisnaugle* courts went so far as to extend the application of the immunity provision to include cases in which the employer engaged in willful or wanton misconduct. *See* note 84 *supra*.

The plaintiff in *Brewer* was injured when a gasoline storage tank overflowed, caught fire and exploded, causing the detonation of illegally stored explosives. Brewer v. Appalachain Constr., Inc., 135 W. Va. 739, 741-42, 65 S.E.2d 87, 89-90 (1951). The plaintiff alleged that the employer, with knowledge of the attendant circumstances, sent the plaintiff into an adjacent structure to attempt to salvage equipment deliberately intending to kill or injure the plaintiff. *Id.* at 742, 65 S.E.2d at 90. While acknowledging that the facts constituted negligence, the court found the plaintiff's allegations of intent merely conclusory and refused to imply the deliberate intent necessary to overcome the limited employer immunity. *Id.* at 750, 65 S.E.2d at 94. The defendant in *Eisnaugle* injured the plaintiff by striking him with his automobile in their employer's parking lot. Eisnaugle v. Booth, ___ W. Va. ___, 226 S.E.2d 259, 260 (1976). Since the workmen's compensation statutes covered the plaintiff's injuries, the exclusive remedy provision barred him from bringing suit against the defendant even though the defendant was intoxicated at the time of the accident. *Id.* at ___, 226 S.E.2d at 261.

Many other jurisdictions have held previously that willful and deliberate violations of reasonable safety precautions which result in an employee's injury do not constitute a deliberate intent to injure. *See, e.g.*, Haggar v. Wartz Biscuit Co., 210 Ark. 318, ___, 196 S.W.2d 1, 3-4 (1946); Law v. Dartt, 109 Cal. App.2d 508, ___, 240 P.2d 1013, 1014 (1952); Southern Wire & Iron Co. v. Fowler, 217 Ga. 727, ___, 124 S.E.2d 738, 740-41 (1962); Duncan v. Perry Packing Co., 162 Kan. 79, ___, 174 P.2d 78, 83 (1946); Kenner v. Henreco, 161 So. 2d 142, 143 (La. App. 1964); Kennecott Copper Corp. v. Reyes, 75 Nev. 212, ___, 337 P.2d 151, 53 (1959); Wilkinson v. Achber, 101 N.H. 7, ___, 131 A.2d 151, 53 (1959); Bryan v. Jeffers, 103 N.J. Super 522, ___, 248 A.2d 129, 130 (1968); Finch v. Swingley, 42 App. Div.2d 1035, 1035, 348 N.Y.S.2d 266, 267-68 (1973); Roberts v. Barclay, 369 P.2d 808, 810 (Okla. 1962); Heikkila

tors may question the equity underlying the exclusive remedy provision of workmen's compensation statutes,[87] the *Manolidis* decision represents a wholly inappropriate intrusion by the court into the legislative sphere.[88] Not only does the decision reject stare decisis[89] and violate clear legislative intent,[90] but it also displays the court's lack of concern for the disruptive effects that such a radical change may engender. The lucrative damages of common law tort claims virtually invite employees to prosecute actions for all injuries involving the violation of safety statutes.[91] The res judicata effects of workmen's compensation settlements[92] may force employers to litigate such claims on the issue of liability where the possibility of a common law suit on the injury is present.[93] The increased numbers of claim contests and litigation may overwhelm the administrative machinery which must handle these disputes, resulting in delays and increased costs to state government.

The economic consequences of the *Manolidis* ruling may spur swift legislative reaction. Although employers remain liable for statutory contributions to the workmen's compensation fund, *Manolidis* erodes at least a portion of the immunity upon which the contributions are based. Employers now face the legal expenses of defending many common law actions[94]

---

v. Ewen Transfer Co., 297 P. 373, 374 (Or. 1931); Evans v. Allentown-Portland Cement Co., 433 Pa. 595, ___, 252 A.2d 646, 647 (1969); Steele v. Eaton, 130 Vt. 1, ___, 285 A.2d 749, 751 (1971).

[87] *See* Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 913 (1978); *Providing For The Victims?*, *supra* note 23, at 97.

[88] *See* Maynard v. Island Creek Coal Co., 115 W. Va. 249, 252, 175 S.E. 70, 72 (1934); note 54 *supra.*

[89] *See* note 86 *supra.*

[90] *See* text accompanying notes 43-53 *supra.*

[91] *See* Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 922-23 (1978) (Neely, J., dissenting).

[92] Findings on any relevant issue in a workmen's compensation proceeding are res judicata in subsequent actions at law. 3 LARSON, supra note 1, at § 79.71. *See, e.g.*, Drier v. Randforce Amusement Corp., 14 Misc. 2d 362, 364, 179 N.Y.S.2d 412, 416 (1958) (issue involved the nature of the injury); Smith v. General Motors Corp., 63 F. Supp. 101, 103 (E.D. Mo. 1945) (cause of employee's death); Ayers v. Genter, 367 Mich. 675, 117 N.W.2d 38, 40 (1962) (the existence of the employment relationship); Skelly Oil Co. v. District Ct., 401 P.2d 526, 527 (Okla. 1964); Shoopman v. Calvo, 63 Wash.2d 627, ___, 388 P.2d 559, 560 (1964) (whether the accident arose from the course of employment). Thus, if an employer believes that a particular claim may form the basis for a common law action, the employer will be reluctant to settle the claim because of potential res judicata effects in later proceedings. *See* Farm Bureau Brief, *supra* note 45, at 16-17. *See also* Demler, *Remedy for the Intentional Torts of a Workmen's Compensation Carrier*, 1 PEPPERDINE L. REV. 54, 67-68 (1973).

[93] *See* note 92 *supra.*

[94] In cases where a court grants summary judgment at the close of the plaintiff's case-in-chief, the defendant already will have incurred considerable legal expenses. The employer must pay counsel while the plaintiff engages in discovery, even when the claim is not ultimately litigated. One purpose of the workmen's compensation statutes is to relieve employers from the burden of defending numerous tort claims. *See* Maynard v. Island Creek Coal Co., 115 W. Va. 249, 252, 175 S.E. 70, 71 (1934). A system which forces upon employers the aggravation and expense of defending each claim arising from a safety violation is contrary to such a purpose.

which previously were disposed of summarily by trial courts.[95] Although a single tort award may force a small company into bankruptcy, with concomitant effects on employment and local economies, large industries may be able to pass these costs on to the consumer in part.[96] Such a system calls into question the propriety of unlimited punitive recoveries and may seriously damage industrial development in West Virginia.

The legislatures of several states have adopted alternatives to the imposition of unlimited common law liability when an employer's willful safety violation results in injuries to workers.[97] These statutes generally provide for the assessment of an additional percentage of workmen's compensation payments against employers guilty of such violations.[98] The workmen's compensation bureau may assess such a penalty against the guilty employer and award the funds to the accident victim during the course of the standard administrative proceedings. Since the workmen's compensation fund does not cover such additional awards, the payment penalizes only the offending employer. Thus, such statutes effect the same result as the *Manolidis* decision by encouraging compliance with safety regulations and providing additional compensation to employee accident victims without exposing employers to unlimited tort liability.

WILLIAM R. GOODELL

---

[95] *See* note 22 *supra.*

[96] *See* Manolidis v. Elkins Indus., Inc., ___ W. Va. ___, 246 S.E.2d 907, 923 (1978) (Neely, J., dissenting).

[97] *See* note 3 *supra.*

[98] Different statutory schemes provide for the additional assessment of different percentages of the workmen's compensation award. North Carolina permits an additional ten percent penalty to be assessed an employer, N. C. GEN. STAT. § 97-12 (Cum. Supp. 1977), while California permits a fifty percent assessment. CAL. LAB. CODE § 4553 (West Cum. Supp. 1978). Ohio provides a flexible system by giving discretion to the workmen's compensation board to assess a penalty between fifteen and fifty percent of the compensation payments. OHIO CONST. art II, § 35 (Page 1955). *See generally* note 3 *supra.*