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TORT LIABILITY FOR EMPLOYERS WHO CREATE WORKPLACE CONDITIONS "SUBSTANTIALLY CERTAIN" TO CAUSE INJURY OR DEATH

Barbara J. Tucker*

INTRODUCTION

A broken and guardless sawmill planer “literally ripped to pieces” the left arm of Spring Creek Forest Products employee Randal Noonan on December 22, 1980.1 The planer amputated three fingers and the thumb of Noonan’s left hand and ripped the skin off his left arm “from his wrist to his elbow.”2 Employees had requested that the planer, which had been broken for about a month, be repaired.3 The planer had injured two other workers on three separate occasions and had lacerated one of Noonan’s fingers previously as well.4 Noonan alleged that his foreman repeatedly worked while intoxicated and was intoxicated on the day of the injury.5 Moreover, Noonan alleged that Spring Creek knew the foreman worked while intoxicated, knew the planer was broken, knew the condition of the planer violated OSHA regulations, and knew the planer had injured other employees, but it had concealed these injuries from Noonan.6 Notwithstanding these facts, the Montana Supreme Court held that Noonan could not sue Spring Creek in tort.7 The court reasoned that because the company did not specifically intend to harm Noonan, he could not bring himself within the “true intentional tort” exception to Montana’s exclusive remedy rule.8 Workers’ compensation, therefore, was Noonan’s exclusive remedy.9 In so holding, Montana placed itself

* I gratefully thank University of Montana Law School professors David Patterson, Larry Elison, and Steven Bahls as well as workers’ compensation attorney Thomas Bulman of Bulman Law Associates, all of Missoula, Montana, for their kind comments and suggestions regarding this comment.

2. Id. at 227, 700 P.2d at 627. (Sheehy, J., dissenting).
3. Id. at 223, 700 P.2d at 624.
4. Id. at 227, 700 P.2d at 627. (Sheehy, J., dissenting).
5. Id. at 223, 700 P.2d at 624. Noonan alleged these facts in his complaint, a deposition, and an affidavit. Id. at 225, 700 P.2d at 626. The case was appealed from a summary judgment. Id. at 223, 700 P.2d at 624.
6. Id.
7. Id. at 225-26, 700 P.2d at 625-26. The Occupational Safety and Health Administration in Billings, Montana, responded to a Freedom of Information request as to whether Noonan and his co-workers’ accidents resulted in penalties or inspections by stating: “We have no record of inspections of these accidents.” Letter from David J. DiTommaso, Area Director U.S. Dept. Labor, OSHA, to Barbara J. Tucker (May 3, 1989) (letter on file at the Montana Law Review Office).
9. Id.
squarely within the majority of jurisdictions.

In the majority of jurisdictions, regardless of an employer's willful and wanton disregard for workplace safety, the exclusive remedy rule denies an injured worker access to remedies other than workers' compensation. The reason most often stated for the rule is that allowing tort suits under these conditions would shatter the fragile balance between worker and employer rights struck by the workers' compensation system.\footnote{10. See, e.g., Great Western Sugar Co. v. District Court, 188 Mont. 1, 6-7, 610 P.2d 717, 720 (1980); Johns-Manville Prod. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 474, 165 Cal. Rptr. 858, 863, 612 P.2d 948, 953 (1980).}

However, in a growing minority of jurisdictions, when an employer willfully ignores workplace safety or knowingly exposes an employee to conditions that will harm or kill the employee, the employer faces tort liability. Crystallizing the view of the minority, the Michigan Supreme Court, a leader in this trend, stated, "Prohibiting a civil action in such a case 'would allow a corporation to 'cost-out' an investment decision to kill workers.'"\footnote{11. Beauchamp v. Dow Chem. Co., 427 Mich. 1, 25, 398 N.W.2d 882, 893 (1986) (quoting Blankenship v. Cincinnati Milacron Chem., 69 Ohio St. 2d 608, 617, 433 N.E.2d 572, 579 (1982)) (Celebrezze, C.J., concurring)(emphasis added).}

It remains a constant, though, that in the majority of jurisdictions in the United States an employer can knowingly expose employees to a toxic substance or to an unsafe workplace, and, unless that employer does something more, such as fraudulently concealing workplace hazards, workers' compensation provides the employee's exclusive remedy. Part I of this comment gives an overview of workers' compensation law and its effect on workplace safety. Part II examines the majority rule that an injured employee can sue an employer in tort only when the employer commits a "true intentional tort," such as physically assaulting the employee. Part III examines the minority rule, which holds that if an employer knowingly exposes an employee to conditions substantially certain to result in employee injury, the employer has committed an intentional tort and the employee may sue in tort. Part IV examines Montana's treatment of the exclusive remedy bar, and the conclusion recommends that Montana adopt the minority rule.\footnote{12. For additional discussion of intentional torts as an exception to the exclusive remedy rule, see Comment, The Exclusivity Rule: Dual Capacity and the Reckless Employer, 47 Mont. L. Rev. 157 (1986)(authored by John Bohyer).}

I. THE WORKERS' COMPENSATION SYSTEM AND OSHA REGULATION: ILLUSORY PROMISES OF WORKPLACE SAFETY

A. Overview of Workers' Compensation

In all fifty states, workers' compensation constitutes an injured employee's exclusive remedy for employer negligence. Workers' compensation creates a trade-off whereby the system gives the injured employee a...
“relatively quick, certain, and standardized compensation,” but bars the employee from bringing a common-law suit unless an employer commits a traditional intentional tort, such as physically assaulting an employee. With this trade-off, the injured employee need not prove employer negligence to recover, and the employer forgoes the common-law defenses of contributory negligence, assumption of risk, and the fellow-servant rule. Workers’ compensation provides cash benefits and reimbursement for medical care to injured employees through a system of social insurance, which pays standardized amounts for specific types of injuries. Consumers, however, ultimately bear the cost of employee injuries, because manufacturers incorporate the cost of workers’ compensation insurance into the price of the product.

B. Workplace Injuries

A “universally stated goal” of workers’ compensation is to encourage workplace safety. In 1987, however, more than six million work-related injuries occurred, including 351,000 more injuries and 53,000 more occupational illnesses than in 1986, constituting a five-percent increase over 1986. On average, about two million workers are disabled each year in

14. Id.
15. Id.

Montana ranks in the bottom half of the states in four major categories of workers’ compensation benefits, according to a March 1989 U.S. Department of Labor report. Montana Work-Comp Benefits Given Low Rating, Billings Gazette, Apr. 5, 1989, at 5-C, col. 1 [hereinafter Montana Work-Comp Benefits]: “Montana ranked from 29th to 46th in four different benefit categories: maximum benefits for temporary total disability — 33rd; permanent total disability — 31st; permanent partial disability — 46th; and death benefits for surviving spouses and children — 29th.” Montana’s AFL-CIO Executive Secretary Jim Murry said the report “ought to deflate the myth about overly generous benefit payments,” and “outrageously high premium rates” in Montana. Id. “[I]t’s time for the debate to focus on the real problem: the increasing number of injuries in the workplace,” Murry added. Id.

18. Larson, supra note 16 at § 1.00.
20. See Work Injuries Increase Again: Government Cites 5 Percent Jump in ’87, Missoulian, Nov. 16, 1988, at 7, col. 6, [hereinafter Work Injuries].
the United States and another 12,000 die from work-related injuries. Thus, the workers’ compensation system has fallen short of its goal of workplace safety when the “actual rate of injury, death, and disease is at an all time high.”

While some government experts attribute the reported increases in injuries and occupational illnesses to better record-keeping, others, such as BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NEWS 5, Table 3 (Dec. 19, 1988):

Table 3. Occupational injury and illness incidence rates per 100 full-time workers, 1973-87

<table>
<thead>
<tr>
<th>Year</th>
<th>Total cases</th>
<th>Lost workday cases</th>
<th>Nonfatal cases without lost workdays</th>
<th>Lost workdays</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>11.0</td>
<td>3.4</td>
<td>7.5</td>
<td>53.3</td>
</tr>
<tr>
<td>1974</td>
<td>10.4</td>
<td>3.5</td>
<td>6.9</td>
<td>54.6</td>
</tr>
<tr>
<td>1975</td>
<td>9.1</td>
<td>3.3</td>
<td>5.8</td>
<td>56.1</td>
</tr>
<tr>
<td>1976</td>
<td>9.2</td>
<td>3.5</td>
<td>5.7</td>
<td>60.5</td>
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<tr>
<td>1977</td>
<td>9.3</td>
<td>3.8</td>
<td>5.5</td>
<td>61.6</td>
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<tr>
<td>1978</td>
<td>9.4</td>
<td>4.1</td>
<td>5.3</td>
<td>63.5</td>
</tr>
<tr>
<td>1979</td>
<td>9.5</td>
<td>4.3</td>
<td>5.2</td>
<td>67.7</td>
</tr>
<tr>
<td>1980</td>
<td>8.7</td>
<td>4.0</td>
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<tr>
<td>1981</td>
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<tr>
<td>1987</td>
<td>8.3</td>
<td>3.8</td>
<td>4.4</td>
<td>69.9</td>
</tr>
</tbody>
</table>

While the Bureau of Labor Statistics has “the best available” data, it still “greatly understate[s] accident and illness rates . . . .” Simison, Safety Last—Job Deaths and Injuries Seem to Be Increasing After Years of Decline: Cost Cutting and Less Stress on Safe Practices Explain Higher Rate of Accidents: Does One Year Make a Trend? Wall St. J., Mar. 18, 1986, at 1, 25, col. 6, 1 [hereinafter Simison]. Workplace “fatalities in 1984 rose 21% from 1983, to 3,740, and injuries, 13% to 5.3 million.” Id. at 1, col. 6.

21. Comment, supra note 19, at 162 & n.50 (quoting T. DZIELAK AND L. GREINER, INJURED AT WORK (1985)).


23. Comment, supra note 19, at 162 & n.50 (quoting T. DZIELAK AND L. GREINER, INJURED AT WORK (1985)).

24. Work Injuries, supra note 20, at 7, col. 6 (reporting comments of OSHA and Bureau of Labor Statistics directors).
as the AFL-CIO, attribute the increase to OSHA's failure to enforce safety standards and regulations. Eula Bingham, former OSHA Director under the Carter administration and now a professor of environmental health at the University of Cincinnati, explains that the 1984 increases came “three years after the Reagan administration started cutting health and safety enforcement and five years after employers slashed health and safety spending.”

Testimony before the U.S. Senate indicated that in its first two years in office “the Reagan Administration radically altered OSHA enforcement policies [by] limiting the number of employers subject to OSHA inspections and reducing citations and penalties for violations of the law.” These changes largely exempted the majority of employers—as many as eighty-six percent in manufacturing—from routine OSHA safety inspections.

The Reagan administration also changed policies regarding complaint inspections in 1982, directing area offices “not to conduct inspections” if workers complained about less than “serious hazards.” According to Senate testimony:

From . . . 1980 to . . . 1983, the number of workplace inspections conducted by the agency declined by 8,000 and the number of workers covered by inspections fell from 3.7 million to 2 million. The number of serious citations issued fell by 41 percent, and the number of [detected] willful violations by 91 percent. Total penalties proposed for violations fell from $25.5 million to $5.6 million, a drop of 78 percent . . . .

The evidence shows that as a “direct result” of these administrative poli-
cies, OSHA enforcement "plummeted." While no direct evidence exists to link a decrease in safety enforcement with an increase in injury rates, the circumstantial link between the two is apparent.

The recession of the early 1980s also contributed to deterioration in workplace safety. A tight economy prompted employers to “reduce [ ] sharply” health and safety budgets and, instead, to “stress ... competitiveness, often at the expense of safety,” resulting in increased death and injury rates. In addition to the human tragedy, workplace accidents are expensive. The National Safety Council estimates that in 1984, such accidents drained national productivity of “$33 billion in lost wages, medical expenses, property damage and indirect costs . . . .” In 1985, each time an American worker sustained a disabling injury in the workplace, that injury cost an employer $18,650, an increase of more than seven percent from 1984.

OSHA civil penalties and criminal provisions are woefully inadequate to induce employer compliance with safety regulations. Despite the high costs to industry that accidents impose, those costs, even combined with

31. Id.

32. Simison, supra note 20, at 1, col. 6. Noting that the injury rate for oil and gas extractions “shot up 22% in 1984, more than for any other industrial category,” Simison reported that safety “appear[s] to have deteriorated most in construction, manufacturing, and oil and gas extraction.” Id. at 25, col. 1. For example, a Wyoming oil company drilled at night to save money even though state safety regulations prohibited the practice. Id. at 1, col. 6. The lights needed for nighttime drilling increase the risk of explosions and “[j]ust such an explosion" killed one man and injured four others. Id. Only a month after this accident, another rig worker for the same company was killed when a drilling pipe crushed him, because workers rushed the job. Id. Cutting costs by terminating safety engineers by reductions in force, and by hiring inexperienced hands “apparently contributed” to another Wyoming rig worker's death in February 1985. Id. at 25, col. 1.

Inadequate training and maintenance also caused a chemical leak at a Kerr-McGee Corporation uranium-reprocessing plant. The leak killed one worker and injured 32 others. Id. “[I]mproper inspection and maintenance” may have caused the July 23, 1984, Unocal Corp. refinery explosion at Lemont, Illinois, which killed 17 and injured 17 others. Id. OSHA proposed only $31,000 in fines for the incident. Id.

OSHA officials contended that “discontin[uance of] safety training and safety maintenance” caused the deaths of two St. Joe Resources Co. employees who died of carbon-monoxide poisoning in Monaca, Pennsylvania, and yet proposed fines of only $20,000 in that incident. Id.

Two McDonnell Douglas Corp. pipe fitters died October 3, 1985, in St. Louis from chemical burns when they attempted to maintain “productivity at the expense of safety . . . .” Id. OSHA proposed fines of $44,300 for alleged violations contributing to these deaths. Id.

Barrie Lighting Co. of Newark, Ohio, paid only $1,320 for twelve OSHA violations, nine of which related to an accident in which a nineteen-year-old woman lost seven fingers. Fines Follow Accident That Severed 7 Fingers, Columbus Dispatch, Apr. 12, 1989, at 5E, col. 1.

33. Simison, supra note 20 at 1, col. 6.

34. Labor Letter: A Disabling Injury, Wall St. J., Apr. 14, 1987, at 1, col. 5. The Du Pont Co. estimated that a company with 1,000 employees “would need $11.3 million ... [in] sales to offset ... [injury] cost[s].” Id.
"out-of-date" OSHA penalties, do not in many instances outweigh the benefits of noncompliance. A maximum OSHA fine of $1,000 for serious hazards, for example, "provides little incentive for compliance." Even where OSHA has fined major corporations, such as General Dynamics, Chrysler and IBP, a large meatpacker, $500,000 or more for multiple safety violations, these fines have failed to inspire safer workplaces nationwide.

This failure is largely because OSHA subjects an employer to criminal sanctions only when a standards violation results in an employee's death, when an employer falsifies records, or when an employer uses advance notice to avoid an inspection or to cover up unsafe conditions. Criminal provisions do not apply, for example, to cases where employees "are maimed or poisoned" through intentional violations of OSHA standards but no worker dies. Thus, with the severe curtailment of inspections, infrequency of large fines, and the unlikelihood of criminal prosecution for even the most egregious safety violations, an employer frequently has little to fear under the current OSHA penalty system.

The Reagan administration also slashed OSHA's budget. For exam-

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35. Williams, supra note 27, at 25. Currently, "[e]very other safety and health and environmental law has stronger penalties and criminal provisions." Id.
36. Id.
38. OSHA has levied some very large fines. For example, Chrysler Corporation agreed to pay $1.6 million for overexposing workers to lead and arsenic and for other alleged health and safety violations. Chrysler Agrees to Pay $1.6 Million Fine to Settle OSHA Health, Safety Charges, Wall St. J., July 7, 1987, at 3, col. 2.


IBP Corp., the nation's second largest meatpacker, agreed to pay "a reduced penalty of $975,000 to settle record total fines assessed against a single employer" for deliberately concealing worker injuries and illness at its Dakota City, Nebraska, plant. IBP to Pay $975,000 to Settle Charges on Safety, Sources Say, Wall St. J., Nov. 23, 1988, at C 13, col. 2.

OSHA has proposed a new record $4.3 million fine against United Brands' John Morrell & Co. plant in Sioux Falls, South Dakota, for "willfully ignoring" cumulative-trauma injuries to workers. OSHA Urges Record Penalty For Meatpacker: United Brands' Morrell Unit Faces $4.3 Million Fine Over Safety Violations, Wall St. J., Oct. 31, 1988, at A4, col. 1. For 1988, the Morrell plant's injury rate was "41.7 per 100 full-time workers, or nine times the annual industry average, OSHA said." Id. (emphasis added). "The company knew of the problem as early as 1984 but did little to correct it, the agency said." Id. OSHA added that "[f]ully 880 of 2,000 employees at the Morrell plant sustained serious and sometimes disabling cumulative-trauma injuries between May 1987 and April 1988 . . . ." Id.

OSHA proposed $1.6 million in fines against East Helena's Asarco Inc.'s lead smelter for "202 'egregious willful' violations, including exposing workers to lead and arsenic at levels 'far in excess' of permitted levels . . . ." U.S. Cites Asarco and Asks Fines of $1.6 Million, Wall St. J., Apr. 20, 1988, at 32, col. 4. An OSHA deputy assistant secretary stated, "This plant has consistently ignored basic safety and health protection for its workers . . . ." Id.
39. Williams, supra note 27, at 25.
40. Id.
41. Id.
ple, Reagan's proposed 1982 OSHA budget was $195.5 million, while President Carter's proposed budget was $242.6 million, $47.1 million more than Reagan's 1982 and $7.1 million more than Reagan's 1988 budget of $235.5 million. The Reagan administration also cut budgets for other related agencies, such as the National Institute for Occupational Safety and Health, the Environmental Protection Agency's Office of Toxic Substances, and the National Cancer Institute. As Lynn Williams, President of the United Steelworkers of America correctly stated, "The net result [of the budget cuts] is a diminished role for the federal government and reduced activity in workplace protection efforts . . . at a time when . . . growing concerns and growing demands for action on safety and health matters [exist]."

In Montana, a worker currently faces not only a workplace constrained by a tight economy and endangered by weakened OSHA enforcement, but also a new, more restrictive definition of injury under workers' compensation. The new definition makes it more difficult for the injured worker to receive workers' compensation. Finally, the Montana worker faces the exclusive remedy rule, which bars an action in tort unless the employer's conduct fits Montana's "true intentional tort" exception.

C. The Role of the Exclusive Remedy Rule

In the majority of jurisdictions, the exclusive remedy rule insulates an employer from a tort action unless he or she "intentionally" harms an employee. An Arizona case graphically illustrates the causal link be-

42. Williams, supra note 27, at Table 8.
43. Id. According to testimony, these reduced agency budgets also resulted in salaries that are "much lower than comparable jobs in the private sector," having a starting pay range from $15,118 to $18,726. Id. at 28. Congress's Office of Technology Assessment reported that by 1985, OSHA had only 1,089 inspectors, a cut of 16% from its 1979 levels, and noted as early as 1985 that the agency's regulatory effort was "already weak." Simison, supra note 29, at 25, col. 2.
44. Williams, supra note 27, at 28.
45. Id. at 28-29.
46. Many of Montana's employers do not qualify for OSHA inspection because of their "small business" status. MONT. CODE ANN. § 39-71-119 (1987) redefines injury so that only those injuries "caused by a specific event on a single day or during a single work shift" are covered. Id. at (2)(d). The new definition specifically excludes "emotional or mental stress . . . cardiovascular, pulmonary, respiratory, or other disease[s]." Id. at (3)(a), (5). See also Comment, The Definition of Injury Under the Workers' Compensation Act: Revisited and Redefined, 49 MONT. L. REV. 341 (1988)(authored by Kraig Kazda).
47. See Trieweiler, The New Workers' Compensation Act—Something For All Montanans to be Ashamed of, 50 MONT. L. REV. 83 (1989).
48. See MONT. CODE ANN. § 39-71-411, 413 (1987). Similar to other states' exclusive remedy provisions, Montana's provides:

[A]n employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act . . . . The Workers' Compensation Act binds the employee . . . and in the case of death binds the (employee's) personal representative and all persons having any right or claim to compensation for [the employee's] injury or death . . . .
between safety violations and worker safety and further shows the tragedy of the exclusive remedy rule. In Serna v. Statewide Contractors, Inc., a twenty-five-foot-deep ditch collapsed, buried, and killed two workers. The trench had caved in previously, burying one employee "to his waist." On at least thirteen separate occasions over a five-month period prior to the deaths, Arizona safety inspectors had warned the contractor that it had not adequately trenched the slopes and had recommended providing escape ladders inside the trench. Instead of remedying the safety problems, the contractor told the men to "crawl inside the sewer pipe" they were laying and wait to be dug out if a cave-in occurred. The ditch did collapse, and workers did run for the sewer pipe, but were buried before they could reach it. While the Arizona Court of Appeals stated it had "no difficulty" in finding that the deadly cave-in was the "direct result" of Statewide's refusal to follow the safety inspector's recommendations, the court nevertheless held that Statewide's willful and wanton misconduct was not specifically directed at the two men. Thus,


50. Id. at 13, 429 P.2d at 505. According to a National Institute for Occupational Safety and Health study, excavation cave-ins cause nearly one percent of all work-related deaths annually. Labor Letter — A Special News Report on People and Their Jobs in Offices, Fields and Factories: Excavation Cave-Ins, Wall St. J., Mar. 4, 1986, at 1, col. 5. The study reports that such accidents may occur because employers misinterpret OSHA rules.
the employers remained immune from a tort suit.\textsuperscript{57}

II. THE MAJORITY RULE: A SUBJECTIVE TEST FOR EMPLOYER INTENT

A. The Rule

Courts following the majority rule hold that "failure to provide a safe workplace" does not constitute an intentional tort.\textsuperscript{58} Instead, the majority of courts, Montana's included, limits an employee's recovery to cases in which the employer commits a "true intentional tort,"\textsuperscript{59} that is, when the employer "truly intended the injury as well as the act."\textsuperscript{60} The Montana

57. In a case similar to Serna, a 17-foot wall of a trench collapsed burying and killing two 25-year-old workers in Annandale, Virginia. Va. Jury Probes Building Firms' Safety Practice, Wash. Post, Feb. 2, 1980, C2, col. 1. Although substantial testimony indicated their employer blatantly violated safety regulations, because the two workers were single and left no dependents, the sole liability of the employer for their deaths amounted to a $1,000 allowance for each employee's burial expenses. Id. If deaths occurred in Montana under similar circumstances, workers' compensation would pay $1,400 for burial expenses. Mont. Code Ann. § 39-71-725 (1987).

Hazardous occupations, such as logging, construction, and oil-field work, frequently employ young, single men. In at least one case, Barnes v. Double Seal Glass Co., 129 Mich. App. 66, 341 N.W.2d 812 (1983), parents of a 16-year-old boy, who was working illegally, alleged that by consciously withholding emergency medical care, the employer allowed their son to die. As a result, the employer merely paid death benefits and avoided paying disability payments over the rest of the boy's life. Id. at 69-70, 341 N.W.2d at 814.

In Barnes, a foreman ordered three employees to load a cart with glass and move it to another area. Although the cart could only withstand 500 pounds, the workers overloaded the cart so one side weighed 2,460 pounds. Id. at 69, 341 N.W.2d at 814. When they attempted to push the cart, a wheel shattered and the entire load of glass fell on Tim Barnes. "The glass sheared off part of decedent's skull, crushed his skull and tore major arteries." Id. Instead of calling for emergency medical aid, which was only four minutes away, Barnes' foreman went "into his office for 10 to 20 minutes to compose himself, leaving decedent bleeding under the shattered glass." Id. The Double Seal employees finally drove Barnes to the hospital in the back of an open pick-up truck but told hospital personnel that they had found him by the side of the road. Id. at 69-70, 341 N.W.2d at 814. After leaving the hospital the employees "cleaned up the accident site so that police would not be able to accurately investigate the accident." Id. Barnes' parents later contended that the foremen and the other employees "conspired to let decedent die because they knew that worker's compensation death benefits were radically lower than payment of disability benefits . . . ." Id. at 66, 341 N.W.2d at 812.

58. Courts following the majority rule generally hold, as in Reed Tool Co. v. Copelin, 689 S.W.2d 404 (Tex. 1985), that "failure to provide a safe workplace does not constitute an intentional injury in order for the claimant to escape" the exclusive remedy of workers' compensation. Id. at 406

In Reed, plaintiff Copelin alleged that Reed Tool "intentionally caused her husband's . . . [severe head injury, which left him brain damaged and in a coma] by intentionally requiring him to work a machine that Reed Tool knew was unsafe, did not meet minimal safety standards, and was defective because of a modification." Reed made. Id. at 405. Copelin also alleged that "Reed Tool knew her husband was inadequately trained and . . . required him to work 'such long hours as violated minimum requirements of law.'" These allegations were insufficient in Texas to overcome the exclusive remedy bar. Id.

59. See Noonan, supra note 8.

Supreme Court described this standard in *Great Western Sugar Co. v. District Court,* in which the plaintiff alleged Great Western's unsafe workplace caused him to suffer permanent foot damage. In that case, the court ruled that the only way for an employee to overcome the exclusive remedy bar is to show that the employer "maliciously and specifically directed [harm] at an employee, or class of employee out of which such specific intentional harm the employee receives injuries as a proximate result." In the "true intentional tort" jurisdictions, then, the only time an employee may maintain an action in tort is when the employer engages in a so-called "true intentional tort," such as fraudulent concealment or an assault or battery. In these jurisdictions, then, employer in-
tent is measured subjectively.

Requiring just such a standard, the Montana Supreme Court recognized this very "narrow exception" to the exclusive remedy rule in *Sitzman v. Schumaker.* In that case, employer-rancher Jake Schumaker struck ranch laborer James Sitzman on the back of the head with a pipe, causing a skull fracture and other severe injuries. Holding that Schumaker had committed an intentional tort, the court stated: "To allow an employer ... personally [to] commit an assault and battery upon an employee and hide behind the exclusivity clause of the Workers' Compensation Act is to disregard the purpose of the Act." The Montana court's "true intentional tort" rule, however, allows employers to do the same thing—to shield other kinds of intentional wrongdoing behind the exclusive remedy rule. For example, the egregiousness of the employer's conduct in *Noonan* could have prompted the Montana Supreme Court to adopt the minority's "substantial certainty" test for intent. Under this test, Noonan could have sued Spring Creek in tort because his injury was substantially certain to occur. Spring Creek allegedly knew its supervisor worked while intoxicated, knew it was in violation of federal safety regulations, and knew that the planer previously had injured other employees, as well as Noonan, in the same way that it had injured Noonan when it mangled part of his hand. Nonetheless, in a four-to-three decision, the Montana Supreme Court reaffirmed *Great Western's* "true intentional tort" standard. To avoid the exclusive remedy bar, according to the majority, Noonan would have had to prove that Spring Creek egregiously violated safety regulations with the specific, indeed subjective, intent of injuring him, an inordinately high themselves from the dust." *Id.* at 29, cols. 3-4.

"Federal and state agencies cited more than 1,300 asbestos violations last year, and a government survey shows that at least 25% of removals are fouled up." *Id.* at 1, col. 6. While no one knows how many dangerous removals are occurring, OSHA "found violations in 219 of 806 removal jobs that it inspected" in 1985. *Id.* at 29, col. 1. In addition, "asbestos regulations are flawed." *Id.* at 29, col. 4. OSHA estimates "that even if its standards were followed to the letter, 64 of every 1,000 workers who remove asbestos would still eventually die from overexposure." *Id.* at 29, cols. 3-4. Moreover, in 1986, OSHA revised asbestos standards for the construction industry so that "short-term work" became exempt "from the full provisions of the standard . . . ." Williams, *supra* note 26, at 19. OSHA does not define "short-term work," however. *Id.* Some construction workers, like sheet-metal workers, "are exposed to asbestos in short-term operations, but on a regular basis." *Id.* However, according to Senate testimony, when workers such as these complain about asbestos exposure, OSHA either fails to inspect the worksite or "inspections generally are not scheduled or conducted until after the asbestos work is done." *Id.*

64. *Mont.* ____, ____, 718 P.2d 657, 659 (1986)(citing Noonan, 216 Mont. at 224, 700 P.2d at 625, and *Great Western*, 188 Mont. at 7, 610 P.2d at 720).

65. *Id.* at ____. 718 P.2d at 658.

66. *Id.* at ____. 718 P.2d at 659.

67. Noonan, 216 Mont. at 223, 700 P.2d at 624.

68. *Id.* at 225-26, 700 P.2d at 625-26.

69. *Id.* at 225, 700 P.2d at 625. Practitioners should note, however, that part of the reason for the court's holding may have been the "inartful" drafting of Noonan's complaint. *Id.* at 232, 700 P.2d at 630 (Hunt, J., dissenting). Noonan alleged that Spring Creek was
standard of proof.

B. Civil and Criminal Intent Standards

Illinois v. Film Recovery Systems, Inc., although a criminal case, illustrates an employee's difficult burden in maintaining a civil action under the “true intentional tort” standard regardless of the egregiousness of the employer's conduct. Film Recovery Systems operated a plant that recovered silver from used x-ray film. Workers cut the film into pieces and then put the pieces into vats of sodium cyanide and water to recover the silver. The employer knew that the vats emitted lethal cyanide gas in the inadequately ventilated work space. Chemical labels contained lengthy warnings in English about the dangers of cyanide. To circumvent these warnings, Film Recovery Systems hired employees who could neither speak nor read English. Moreover, despite the employees' daily complaints about the fumes and an inspector's warning in 1981 that the operation had overgrown the plant, the employer's only response was to move the executive offices away from exposure to the fumes and to triple the size of the in-plant operations. As a result of these conditions, exposure to cyanide poisoned and killed one worker and seriously injured others.

Illinois prosecutors criminally convicted Film Recovery Systems' corporate officers of involuntary manslaughter. It is doubtful, however, grossly negligent. Had he described the defendant’s conduct as willful, intentional, and “substantially certain” to cause his injury, the court might have been willing to apply the minority test of intent.

By contrast, in a recent case arising in federal district court, the plaintiff alleged that her immediate supervisor “engaged in a series of intentional acts which were specifically and maliciously directed towards her and which ultimately resulted in her mental breakdown and the resultant loss of her job.” Oedewaldt v. J.C. Penney Co., 687 F. Supp. 517, 519 (D. Mont. 1988). The federal court held that if the plaintiff proved her allegations, the defendant’s actions would rise to the level of an intentional tort and exclusivity would not bar a tort suit under Montana law.

70. Nos. 84 C 5064 and 83 C 11091 (Cir. Ct. of Cook County, Ill., June 14, 1985). See discussion of Film Recovery Systems case in Beauchamp, 427 Mich. at 23-25, 398 N.W.2d at 892-93.


72. Id. at 913-14.

73. Facts discussed in Beauchamp, 427 Mich. at 23, 398 N.W.2d at 892.

74. Id.

75. Id.

76. Id. at 23-24, 398 N.W.2d at 892-93.

77. Id. at 24, 398 N.W.2d at 893.

78. Id. See also Magnuson & Leviton, supra note 71, at 915. The Illinois Criminal Code defines homicide differently from the Montana Criminal Code. The Illinois Code states:

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another;
whether even this employer's outrageous conduct met the majority of jurisdictions' "true intentional tort" standard,\(^79\) for Film Recovery Systems did not subjectively intend to poison and kill its workers.\(^80\) However, because Film Recovery Systems knew with a substantial certainty that its workplace conditions would injure or kill its workers, it met the objective standard for intent for criminal liability.\(^81\) Thus, while Film Recovery Systems could escape tort liability for its actions, the court could nonetheless hold its corporate officers criminally liable.

Under the majority rule, then, the standard of proof for intentional conduct is lower for criminal than for civil liability. Montana's statutory "purposely" standard for criminal law\(^82\) is much less exacting than is the supreme court's intentional tort standard for workers' compensation law. The "purposely" standard\(^83\) in criminal law—Montana's highest for intent—is an objective standard permitting the inference of intent from the evidence. The "true intentional tort" standard for workers' compensation requires more difficult proof, however, because under the majority of jurisdictions' application of the standard, workers must prove their employers' subjective intent. Evidence that an employer pursued profit above worker safety knowing with substantial certainty that injury to a class of workers would occur should, even in "true intentional tort" jurisdictions,

\[\text{(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another. \ldots}\]


79. Note the Beauchamp court's critique of "true intentional tort." Beauchamp, 427 Mich. at 19-25, 398 N.W.2d at 891-93.

80. \textit{Id.} at 25, 398 N.W.2d at 893.


83. \textit{See Mont. Code Ann.} § 45-2-101(58)(1987), which defines "purposely" as a "conscious object to engage in that conduct or to cause that result."

Moreover, under criminal law, the state could prove that a defendant employer acted with knowledge, meeting the "knowingly" standard, a lower standard of intent than either the criminal purposely or the workers' compensation true intent standard. Mont. Code Ann. § 45-2-101(33)(1987). The "knowingly" standard divides further into two categories of intent, that of substantial certainty, when the actor knows a result is virtually certain to occur, and that of high probability, when the actor knows a high risk of harm exists. \textit{Id.} The Montana criminal code defines "knowingly" as conduct that has a high probability of harm. For example, the Montana Criminal Code states: "A person acts knowingly \ldots when he [or she] is aware that it is highly probable" that his or her conduct will cause the harm defined in a criminal offense. \textit{Id.} Thus, Montana's criminal "knowingly" standard is still lower than is the substantial certainty workers' compensation standard adopted in so-called "liberal" minority jurisdictions.
compel the inference that the employer intended the injury. By refusing to draw such inferences of intent only in employment cases, "true intentional tort" jurisdictions, such as Montana's deny workers the remedies they otherwise could obtain under intentional tort analyses. The anomalous result is that workers in majority jurisdictions can prove an employer is criminally liable far more readily than they can prove the employer liable merely in tort.

It is tragically ironic that the majority of courts can recognize an employer's intent to harm when he or she punches a worker in the nose, an act that will not kill the employee, but cannot see that intent to harm when an employer deliberately exposes a worker to a chemical that the employer knows with one-hundred-percent certainty will harm or kill workers. The employer obviously is subjecting the worker to a form of violence. The criminal law recognizes intent to harm without regard to the method by which that harm is effected: fist, gun, or rock. The same should hold true when an employer tortiously and willfully exposes an employee to a defective machine or toxic substance, which the employer knows will injure or harm the employee, and the employee seeks to sue for an intentional tort. The choice of instrumentality should make no difference in the analysis.

III. THE MINORITY RULE: CRAFTING AN OBJECTIVE STANDARD FOR EMPLOYER INTENT

West Virginia, Ohio, and Michigan have all recognized the difficulty of proving an employer's specific and subjective intent to injure an employee. These courts have, therefore, approached this "rigid definition of intentional misconduct" by creating the "substantial certainty" test for inferring intent. Thus, the minority rule infers the requisite tortious intent when an employer knowingly creates conditions "substantially certain" to result in employee injury, illness, or death.

Most of the courts using the minority rule have adopted the Restatement (Second) of Torts definition of intent to assist in the application of negligence terms into the language of intentional tort. The "substantial certainty" rule later developed in Ohio and Michigan offers a clearer analytic approach to employer conduct.


85. Note, supra note 22, at 519.


of this more objective standard:

"If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." It does not matter whether the employer wishes the injury would not occur or does not care whether it occurs. If the injury is substantially certain to occur as a consequence of actions the employer intended, the employer is deemed to have intended the injuries as well [as the result].

Adopting this "substantial certainty" standard in Beauchamp, the Michigan Supreme Court allowed plaintiff Ronald Beauchamp to sue in tort for the damage he sustained because of his exposure to agent orange, while an employee of Dow Chemical Company. Beauchamp's complaint alleged that he had been "physically and mentally affected" by the exposure. Framing his complaint in the language of intentional tort, Beauchamp also contended that Dow "intentionally assaulted" him by exposing him to agent orange without his knowledge or consent. The Michigan Supreme Court remanded Beauchamp's intentional tort claims for further proceedings.

In Ohio as well, an injured employee may sue in tort when an employer knowingly exposes an employee to conditions "substantially certain" to result in injury. In Blankenship v. Cincinnati Milacron Chemicals, the Ohio Supreme Court held that when an employer exposes employees to toxic chemicals that the employer knows with substantial certainty will cause the employees harm, the exclusive remedy rule no longer protects the employer from tort liability. As the court stated, the Ohio Supreme Court stated that it "implicitly" adopted this section in Van Fossen v. Babcock & Wilcox Co., 36 Ohio St. 3d 100, 101, 522 N.E.2d 489, 491 (1988), and in Kunkler v. Goodyear Tire & Rubber Co., 36 Ohio St. 3d 135, 139, 522 N.E.2d 477, 481 (1988). See also Pariseau v. Wedge Products, Inc., 36 Ohio St. 3d at 125 n.1, 522 N.E.2d at 513 n.1 (quoting RESTATEMENT (SECOND) OF TORTS, § 8A, comment b (1965)).

89. Beauchamp at 21-22, 398 N.W.2d at 892 (citing Restatement (Second) of Torts, § 8A, comment b (1965)). The first paragraph of the foregoing quotation comes from the restatement and both paragraphs are quoted in Beauchamp.
90. Id. at 25, 398 N.W.2d at 893. Subsequent to Beauchamp, the Michigan Court of Appeals, in Kachadoorian v. Great Lakes Steel Corp., 168 Mich. App. 273, 424 N.W.2d 34, (Mich. App. 1988), held that the widow of a steel worker who died of burns because his foreman allegedly ordered him "to drive his slag-moving machine under [a] vessel containing molten steel" in violation of the corporation's own safety rules and with knowledge that the vessel frequently overflowed, had raised an issue of whether his death was substantially certain to occur. Id. at __, 424 N.W.2d at 36-37. The court remanded the case for trial. Id. at __, 424 N.W.2d at 36-37.
91. 29 CFR 1910.1000 lists exposure limits for toxic chemicals.
93. Id.
94. Id.
95. Id., at 27, 398 N.W.2d 894.
96. 69 Ohio St. 2d. 608, 433 N.E.2d 572 (1982).
97. Id. at 615-16, 433 N.E.2d at 578.
workers' compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such [tortious] conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act.\textsuperscript{98}

In Jones v. VIP Development Co.,\textsuperscript{99} the Ohio Supreme Court allowed three employer tort cases consolidated on appeal to proceed to trial. The court pointed out that although Ohio law requires a demonstration of employer "intent," "specific intent to injure is not an essential element of an intentional tort . . . [if harm is] substantially certain, [and] not merely likely, to occur."\textsuperscript{100} Notably, Montana's exclusive remedy rule likewise does not explicitly require "specific" or subjective intent.\textsuperscript{101} The Ohio court's elucidation of the intent requisite for overcoming the exclusive remedy bar, thus, offers illumination for Montana's standard as well:

Where a defendant acts despite his knowledge that the risk is appreciable, his conduct is negligent. Where the risk is great, his actions may be characterized as reckless or wanton, but not intentional. The actor must know or believe that harm is a substantially certain consequence of his act before intent to injure will be inferred.\textsuperscript{102}

Like Ohio's court, Montana's could infer an employer's intent from evidence that substantial certainty of harm to employees will occur.

The facts of the two other Ohio cases—Hamlin v. Snow Metal Products\textsuperscript{103} and Gains v. City of Painesville\textsuperscript{104}—consolidated on appeal from summary judgment in Jones illustrate how the substantial certainty test can both relieve courts of difficult subjective standards and yet satisfy the intent element of exclusive remedy statutes by applying an objective test.

In Jones, two workers were harmed seriously when they came in contact with a high-voltage-electrical-power line.\textsuperscript{105} They alleged that the employer "knew, or should have known" of the dangerous conditions and should have warned employees of the danger or made safe the conditions.\textsuperscript{106} Of the three cases presented on appeal, Jones offered the court the most difficulty in balancing on the fine wire between negligence and intent. The court's decision to apply the substantial certainty test and to remand Jones for trial had a profound and unfortunate impact on the law in Ohio.\textsuperscript{107} Jones' facts, rather than constituting substantial certainty of

\textsuperscript{98} Id. at 614, 433 N.E.2d at 577 (emphasis added).
\textsuperscript{99} 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).
\textsuperscript{100} Id. at 95, 472 N.E.2d at 1051 (emphasis in original).
\textsuperscript{102} Jones, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051 (emphasis added).
\textsuperscript{103} 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 90, 472 N.E.2d at 1048.
\textsuperscript{106} Id. at 95, 472 N.E.2d at 1051-52.
\textsuperscript{107} The court's attempt to do justice ultimately led the Ohio legislature to enact severely restrictive legislation. See Comment, Ohio's Attempt to Circumvent the Concept of Intentional Tort—Enactment of Revised Code Section 4121.80, 16 CAP. U.L. REV. 279, 289.
injury or harm, constituted at most gross negligence. Recognizing this in later cases, the Ohio court subsequently narrowed its holding in Jones to avoid opening the floodgates of litigation.

In Hamlin, the plaintiffs along with other employees complained of poor air quality caused by toxic chemicals at defendant Snow Metal Products' plant. When employees complained to the plant supervisor that exposure to these toxic chemicals was making them ill, the defendant either "ignored" or "ridiculed" them. In 1979, when air quality deteriorated further, several employees "broke out in rashes or experienced respiratory problems." An investigation of the plant showed that acid fumes had leaked into the ventilation system, but that plant personnel nonetheless repeatedly assured employees that conditions were safe. The plaintiffs subsequently presented evidence showing Snow Products' awareness of the hazards of working with the chemicals and knowledge of acid fumes recirculating in the workplace.

The Ohio Supreme Court reasoned that if an employer engages in conduct "substantially certain" to cause employees harm, a jury may draw objective inferences to satisfy the intent element of an intentional tort. Drawing such objective inferences from the Hamlin facts, the court concluded that Snow Metal Products' conduct "certainly [fell] within the parameters of intentional wrongdoing, particularly given the added feature of actively misrepresenting the degree of danger to employees, thereby prolonging their exposure to the risk." Had the court demanded a showing of the employer's specific or subjective intent, the Hamlin plaintiffs could not have crossed the exclusive remedy bar.

In Gains, plaintiff and decedent Willie Gains died of injuries he sustained when his arm was drawn into a coal chute by a pulley. Gains' job was to keep the coal chute free from accumulations of coal dust and coal fragments. The defendant employer used a blow torch to remove the safety guard at the top of the chute, ostensibly to make it easier for Gains to perform his job. The Ohio Supreme Court held that the defendant's removal of the chute's safety guard constituted an intentional tort, be-


108. Jones, 15 Ohio St. 3d at 92, 472 N.E.2d at 1049.
109. Id.
110. Id.
111. Id.
112. Id. at 95, 472 N.E.2d at 1051 (emphasis in original).
113. Id. at 97, 472 N.E. 2d at 1053.
114. Id. at 91, 472 N.E.2d at 1048.
115. Id.
116. Id.
cause the guard was intended to protect the plaintiff from "exactly the kind of injury . . . the decedent suffered, . . . the degree of risk posed to employees by the removal of the cover was extremely high, and . . . no warnings were issued to employees concerning this risk." The court explained that:

A defendant who fails to warn of a known defect or hazard which poses a grave threat of injury may reasonably be considered to have acted despite a belief that harm is substantially certain to occur. The evidence . . . supports a finding that the defendant employer knew the removal of the cover posed a substantial risk to its employees.

The court, following its earlier holding in Blankenship, held that when the evidence shows that the employer was "substantially certain" that an injury would occur, the injured employee can maintain a tort action for such injury.

In moving toward a clearer expression of the substantial certainty test, however, the Ohio Supreme Court created an anomalous result. The Jones case in which two workers sustained injuries when they came in contact with high-voltage-power lines arguably constituted gross negligence rather than an intentional tort. Therefore, first the court, and then the Ohio legislature, acted to limit the scope of Jones. Critics of the decision in Jones included Michigan's Beauchamp court, which reasoned that Jones extended the substantial certainty test to include the high probability or "substantial likelihood" of harm. Attempting to

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117. Id. at 96, 472 N.E.2d at 1052.
118. Id.
119. Id. at 96, 97, 98, 472 N.E.2d at 1052, 1054.
120. See Van Fossen v. Babcock & Wilcox Co., 36 Ohio St. 3d 100, 122, 522 N.E. 2d 489, 509 (1988) (Douglas, J., dissenting). In Jones, the majority concluded that under certain circumstances, the deliberate neglect of a known hazardous condition could constitute substantial certainty of harm. Stating that "reasonable minds could differ as to whether the defendant's conduct was intentional," the Jones court remanded the case for trial. Jones, 15 Ohio St. 3d at 96, 472 N.E.2d at 1052.
122. Beauchamp, 427 Mich. at 19 & n.55, 398 N.W.2d at 891 & n.55. Ohio's Justice
limit the effect of the Jones decision and to fashion a workable substantial certainty test, the Ohio court honed its test in three 1988 cases.

In Van Fossen v. Babcock & Wilcox Co, an employee sustained injuries when backing down steps welded onto a machine. No one else had ever had problems with the steps. Nor had a safety inspector apparently ever cited the employer for safety violations related to them. Correctly holding that Van Fossen's injuries were not substantially certain to occur, the Ohio Supreme Court explained that the substantial certainty test for intentional torts describes conduct that is "somewhat less than the deliberate assault on an employee by an employer, but more than the grossly negligent or reckless act of an employer which occasions an injury to the employee." In addition, the majority outlined a three-part test to infer employer intent. That objective test of intent requires:

(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within his [or her] business operation; (2) knowledge by the employer that if employees are required by virtue of their employment to be subjected to such dangerous process, procedure, instrumentality or condition, then harm to them would be a substantial certainty, and not just a high risk; (3) that the employer, under such circumstances, and with such knowledge, did act to so require the employee to continue performing his [or her] employment tasks.

In Pariseau v. Wedge Products, Inc., the first Ohio case with a full trial record to come up on appeal after Van Fossen, the majority cravenly decided that an incident in which a defective punch press amputated three fingers on an employee's right hand amounted to gross negligence instead of an intentional tort. In a concurring opinion, Justice Holmes did, however, provide a useful analysis of the three-part Van Fossen test in applying it to the facts in Pariseau.

Two sub-elements compose the first key concept of the Van Fossen test: 1) whether a "dangerous process, procedure, instrumentality or condition [existed] within [an employer's] business operation" and 2) whether the "employer knew of it." The trial record in Pariseau included "considerable testimony, set forth in nearly absolute terms," that the press in question "was known to 'repeat' its cycle" unexpectedly so

Douglas stated in his dissent in Van Fossen that the Jones facts constituted negligence, not substantial certainty of harm. Van Fossen, 36 Ohio St. 3d at 122, 522 N.E.2d at 509.

123. 36 Ohio St. 3d 100, 522 N.E.2d 489 (1988).
124. Id. at 118, 522 N.E.2d at 505.
125. Id.
126. Id.
127. Id. at 114-15, 522 N.E.2d at 502 (emphasis added).
128. Id. at 116, 522 N.E.2d at 504 (emphasis added).
129. 36 Ohio St. 3d 124, 522 N.E.2d 511 (1988).
130. Id. at 124, 522 N.E.2d at 512.
131. Id. at 129, 522 N.E.2d at 516.
132. Id. at 129-32, 522 N.E.2d 516-19 (Holmes, J., concurring).
133. Id. at 130, 522 N.E.2d at 517 (Holmes, J., concurring).
that the press might come down unpredictably and injure an operator's hand. A former Wedge Products' maintenance superintendent testified that he had told both the plant manager and owner that the press's brakes were defective and unsafe and allowed the press to repeat. The same press previously had also amputated another employee's three fingers because of such failure. Moreover, a pullback-safety device on the press would have prevented Mark Pariseau's injury, but Wedge Products' foreman failed to properly adjust it. Operating the press under such conditions was like playing Russian roulette. Moreover, Wedge Products had knowledge of this dangerous condition, fulfilling the second sub-element of the first part of the Van Fossen test.

Both the Pariseau majority and the dissents apparently agreed that a jury could conclude that these facts met part three of the test, that the employer "did act to require the employee to continue to perform the dangerous task." As one justice stated, despite employees' "continued complaints . . . that the press was repeating, the prior injury to . . . [the other employee] on the same press, the numerous warnings from [Wedge Product's] maintenance superintendent and the knowledge of the problems by management, including the owner of the company, no changes were made to the press." Furthermore, on the very "night of [Pariseau's] injury" the press repeated twice when another employee was operating it. When that employee reported this information to the foreman and "refused to operate the press any longer," the foreman—over the other employee's objections—assigned Pariseau, who had worked at the plant only three weeks, to operate the press. Although other employees used a piece of wood to remove the finished product, because they feared the press would repeat on them and amputate fingers, when Pariseau asked what the wood was for, the foreman tossed "the wood aside, telling [Pariseau] he would not need it." The record also showed that the foreman "knew that another employee had lost the fingers on his

134. Id. "A former maintenance specialist testified that he informed the management orally and in writing that the machine repeated, and therefore jeopardized the hands of the operator. He recommended that particular safety systems be installed, which was not done." Id.

135. Id. at 134, 522 N.E.2d at 520 (Douglas, J., dissenting).

136. Id. at 130, 522 N.E.2d at 517 (Holmes, J., concurring).

137. Id. at 133, 522 N.E.2d at 519 (Locher, J., dissenting). The employer stated that the reason for the accident was the shearing off of a bolt on the press, but two employees testified that after the accident, the foreman "sent them away from the machine . . . , that they observed him . . . beating on it with something metallic . . . [and] that afterward he emerged from the area with a broken bolt, asserting that its failure had . . . [caused] the injuries." Id. at 131, 522 N.E.2d at 517 (Holmes, J., concurring).

138. Id. at 130, 522 N.E.2d at 517 (Holmes, J., concurring) (quoting Van Fossen, 36 Ohio St. 3d at 101, 522 N.E.2d at 491).

139. Id. at 134, 522 N.E.2d at 520 (Douglas, J., dissenting).

140. Id. at 134, 522 N.E.2d at 520-21 (Douglas, J., dissenting).

141. Id. at 134, 522 N.E.2d at 521 (Douglas, J., dissenting).

142. Id. at 135, 522 N.E.2d at 521 (Douglas, J., dissenting).
right hand in 1976" while operating the press. Thus, the jury concluded from this evidence that Wedge Products, through its agent foreman, required Pariseau "to continue to perform the dangerous task" despite substantial certainty of injury, thus, satisfying part three of the test.

However, while the court concluded that the Pariseau facts met parts one and three of the Van Fossen test, it divided over part two of the test—whether the employer knew the injury was substantially certain to occur. The majority apparently viewed Pariseau's injury as a statistical likelihood. The minority, on the other hand, viewed his injury as substantially certain to occur, but that its specific time of occurrence was yet unknown. While courts following the minority rule continue to struggle with this aspect of substantial certainty, they generally hold that an injury, disease, or death is substantially certain to occur when: 1) an employee complains to an employer about defective equipment or toxic substances, or the employer has actual knowledge of the dangerous condition, 2) the employer knows that the equipment or substances have previously injured other employees, and 3) the employer still refuses to fix the machine or condition. Upon evidence of these three factors, a jury may find that an injury, disease, or death was substantially certain to occur.

Notwithstanding overwhelming evidence to the contrary, the Pariseau court held that Pariseau's accident was not substantially certain to occur. The majority apparently determined that the cause of Pariseau's injury was different from the other employee's and was, thus, not substantially certain to occur. The majority also apparently believed that statistical likelihood of harm—regardless of how high—does not constitute substantial certainty of occurrence. Therefore, the majority concluded that it could not infer as a matter of law "that [the foreman] knew, to a substantial certainty, that what he was doing would injure this employee." Implied in the majority's holding is that because the press did not fail every time, injury to an operator was not a substantial certainty. The question, therefore, remains: How defective must a machine be before an employer is substantially certain that the machine will cause an injury?

Pariseau's majority decision allows the employer to play Russian roulette with employee safety. Placing an employee in front of a known defective press that will repeat at a time uncertain is just like placing a revolver loaded with just one bullet at an employee's temple and then telling him or her to pull the trigger until the end of a shift. If the only question outstanding is exactly when defective equipment will cause harm, that harm is nonetheless substantially certain to occur. As dissenting Justice Douglas observed, a jury, two out of three court of appeals

143. Id.
144. Id. at 130, N.E.2d at 517 (Holmes, J., concurring).
145. Id. at 128-29, 522 N.E.2d at 515-16 (emphasis added).
146. Id.
147. Id. at 132, 522 N.E.2d at 519 (Holmes, J., concurring).
judges, and three out of seven Ohio Supreme Court justices agreed that Pariseau's evidence met the requirements of an injury substantially certain to occur.\textsuperscript{148} Indeed, the evidence "fit[] perfectly"\textsuperscript{149} the three-part test outlined in \textit{Van Fossen}.\textsuperscript{150}

In his interpretation of the majority's conclusion, Justice Holmes lapsed into the refuted "true intentional tort" test for intent, stating the employer must specifically intend to "injure this employee."\textsuperscript{151} At least part of the majority's conclusion, then, hinged less on an analysis of the evidence than on an impulse to revert to Ohio's former use of a subjective test of intent. The \textit{Jones} court had explicitly stated that "specific intent to injure" was not an "essential element" of intent under the substantial certainty definition.\textsuperscript{152} Therefore, as Justice Douglas correctly noted, the verdict should not have been "so lightly set aside,"\textsuperscript{153} as Pariseau's injury was one substantially certain to occur.

Pariseau ran the press until "on the very last piece, as he reached in to catch the falling part, the press repeated and his hand, his livelihood and his very life were smashed."\textsuperscript{154} With the \textit{Pariseau} holding, the Ohio Supreme Court also smashed its prior progressive use of objective intent in measuring whether an injury is substantially certain to occur. Nonetheless, the objective test elucidated in \textit{Van Fossen} remains viable and is the clearest statement defining substantial certainty yet articulated from a minority jurisdiction.

\textbf{IV. MONTANA AND THE "SUBSTANTIAL CERTAINTY" TEST}

As the dissents impliedly recommended in \textit{Noonan},\textsuperscript{155} Montana should adopt the substantial certainty test, allowing a jury to infer an employer's intent when the employer knew or should have known the injury was substantially certain to occur. As Justices Sheehy\textsuperscript{156} and Hunt\textsuperscript{157} both pointed out in their well-reasoned dissents in \textit{Noonan}, the law does not require an injured employee to show that the employer "maliciously and specifically directed" his actions against the employee personally.\textsuperscript{158} The unsafe workplace in \textit{Noonan} had "existed over a protracted period of time," with the employer's "full knowledge," and despite employees' com-

\textsuperscript{148} Id. at 135, 522 N.E.2d at 521 (Douglas, J., dissenting).
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 132, 522 N.E.2d at 519 (Holmes, J., concurring) (emphasis added).
\textsuperscript{152} \textit{Jones}, 15 Ohio St. 3d at 95, 472 N.E.2d 1051.
\textsuperscript{153} \textit{Pariseau}, 36 Ohio St. 3d at 135, 522 N.E.2d at 521 (Douglas, J., dissenting).
\textsuperscript{154} Id.
\textsuperscript{155} 216 Mont. at 226, 230, 700 P.2d at 626, 628 (Sheehy, J., dissenting) (Hunt, J., dissenting).
\textsuperscript{156} Id. at 226, 700 P.2d at 626 (Sheehy, J., dissenting).
\textsuperscript{157} Id. at 230, 700 P.2d at 628 (Hunt, J., dissenting).
\textsuperscript{158} Id. at 227, 230, 700 P.2d at 625, 629 (quoting Great Western Sugar Co., 188 Mont. at 21, 610 P.2d at 720) (Sheehy, J., dissenting) (Hunt, J., dissenting).
plaints about the broken planer.\textsuperscript{159} As Justice Hunt observed, "Such conduct, \textit{specifically directs the harm at each and every employee}."\textsuperscript{160} Thus, for employers to face tort liability, they need not have a "specific intent" to harm a specific employee.\textsuperscript{161} An employer's wanton disregard of workplace safety itself objectively manifests the employer's intent to harm employees.

Rejecting the majority's application of a subjective intent standard, Justice Hunt stated that an employer's conduct need not "go so far as . . . [an] . . . assault" to constitute an intentional tort.\textsuperscript{162} Spring Creek's egregious safety violations and requirement that employees work under such conditions or forfeit a portion of their salaries constituted a willful disregard of the welfare of "each and every [Spring Creek] employee."\textsuperscript{163} Therefore, Spring Creek's conscious disregard for safety did not have to be directed \textit{specifically} at Randal Noonan to constitute objective intent sufficient to meet substantial certainty.\textsuperscript{164}

Justice Sheehy summed up the key distinction between the subjective and objective tests for intent in his dissent:

It should be axiomatic that the proof of malicious and specifically directed harm can be inferred from the facts and circumstances surrounding the occurrence. If that be not true, the only possible way for an employee to recover for an intentionally-caused injury from an employer would be the direct admission of the employer that he did in fact so willfully intend [such harm].\textsuperscript{165}

Noting that the Montana Supreme Court has no difficulty in inferring criminal intent from the facts and circumstances in criminal cases, Justice Sheehy concluded: "What beguiling charm of intellect allows inferences to establish malicious intent in criminal cases, in fraudulent conveyances cases, [and in intentional tort cases outside of workers' compensation], but not in a case where a man's left arm is literally ripped to pieces?"\textsuperscript{166}

CONCLUSION

The Montana Supreme Court should allow injured employees to maintain a civil action in intentional tort when an employer's conduct creates conditions substantially certain to harm them. Absent a federal commitment to OSHA protections, employee torts are the only way truly to discourage employers from allowing dangerous workplaces to exist in wanton disregard of their employees' safety.
Although some lobbies will undoubtedly complain that subjecting employers to the threat of tort suits for maintaining an unsafe workplace would make them uncompetitive with other employers, an unsafe workplace is more costly in the long run in increased workers' compensation claims and reduced productivity. Factories or plants that continually injure workers cannot compete with plants that choose the route of safety and continuous production. Indeed, the only way an unsafe plant can compete is through a timid court's subsidizing the operation by failing to hold the tortious employer liable.

Ohio's dissenting justices attacked adoption of the substantial certainty test on the same basis, that goods manufactured in Ohio would "suffer a competitive disadvantage," for example, and that the test would create a "less hospitable climate . . . to attract and maintain industry . . . ."\textsuperscript{167} However, as Ohio Supreme Court Justice Brown stated:

This is a scare tactic to create an illusion that industry will leave . . . and establish itself in other states . . . [which] grant immunity to employers who intentionally harm their employees. . . .

The view expressed to support employer immunity is generated by greed to save a few dollars at the expense of [injured or] chemically poisoned employees. It displays a brutal lack of compassion. It sends a message that dollars saved is more important than workers' lives.\textsuperscript{168}

Montana should convey the message that workers' lives and safety are more important than dollars saved and that an employer who creates or ignores conditions substantially certain to result in injury or death faces the threat of tort liability. As Justice Brown concluded, "[d]ire predictions of excessive litigation and substantial liability always accompany any important decision . . . ."\textsuperscript{169} The Montana Supreme Court should resist such scare tactics and recommit the law to worker safety.

\textsuperscript{167} Blankenship, 69 Ohio St. 2d. at 624, 433 N.E.2d at 583 (Krupansky, J., dissenting).

\textsuperscript{168} Id. at 619-20, 433 N.E.2d at 580 (Brown, J., concurring).

\textsuperscript{169} Id. at 620, 433 N.E.2d at 580 (Brown, J., concurring) (quoting LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 138, 201 N.E.2d 533, 540 (1963)).