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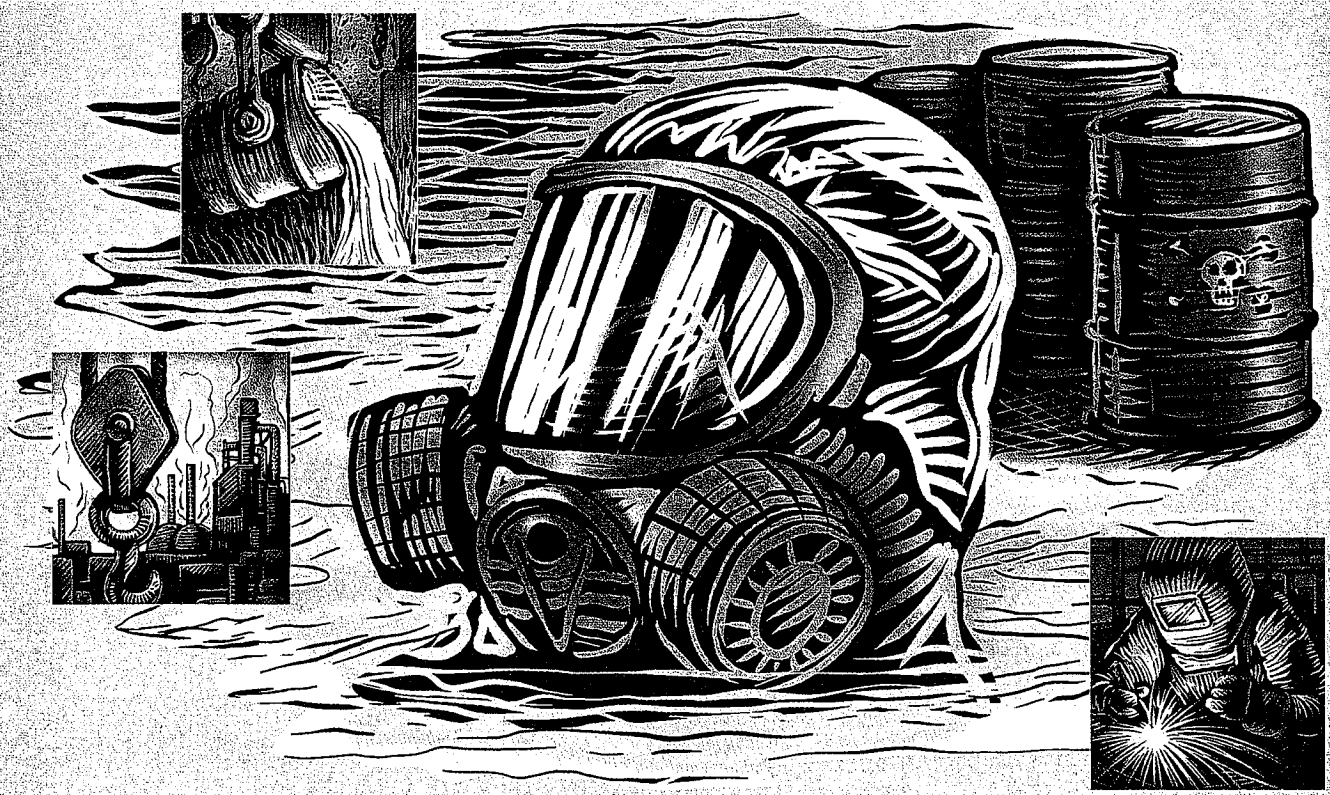

The "Deliberate Intention" Exception to the Industrial Insurance Act after *Birklid v. Boeing*:

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by Randolph I. Gordon
and Amy F. Cook

The "Deliberate Intention" Exception to the Industrial Insurance Act after *Birklid v. Boeing*: A Guidebook for Bench & Bar

"The cruelest thing of all was that nearly all of them – all of those who used knives – were unable to wear gloves, and their arms would be white with frost and their hands would grow numb, and then of course there would be accidents. Also the air would be full of steam, from the hot water and the hot blood, so that you could not see five feet before you; and then, with men rushing about at the speed they kept up on the killing beds, and all with butcher knives, like razors, in their hands – well, it was to be counted as a wonder that there were not more men slaughtered than cattle." — From Upton Sinclair's *The Jungle*

Every day something like this happens: two people are accidentally injured in about the same way, one in the workplace, one elsewhere. From this point on, each is treated differently. Different procedures. Different compensation. Different law. The worker's exclusive remedy is workers' compensation as established under the Industrial Insurance Act (IIA), a "no fault" administrative system which holds the employer immune from any tort liability and abolishes the jurisdiction of the courts to hear such matters.[1] The other person's injury is handled through the civil justice system based upon principles of tort liability with damages established by a jury.

Since 1911 when the IIA was enacted, there has been a statutory exception to this "exclusive remedy" rule: the immunity from civil liability does not apply to employers who deliberately injure their employees. RCW 51.24.020 provides:

> If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker ... shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.[2]

For the first 84 of its 89 years, interpretation of the exception was simple enough. As Justice Talmadge, writing for a unanimous Washington Supreme Court in *Birklid v. Boeing*, 127 Wn.2d 853, 861-62, 904 P.2d 278, 283-84 (1995), wrote:

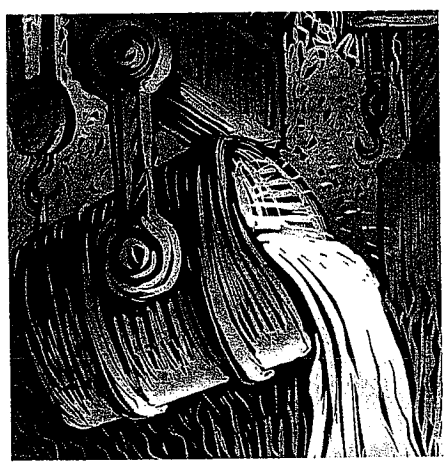
> In summary, our courts have found "deliberate intention" only when there has been a physical assault by one worker against another. Our courts have effectively read the statutory exception to the IIA's exclusive remedy policy nearly out of existence." The court went on to conclude, "[t]he statutory words must ... mean something more.... *Id.* at 863.

What that "something more" is in the context of corporate conduct is being daily worked out in Washington's courtrooms. It is the particular aspiration of the authors to assist both trial judges and trial lawyers with an accessible and useful body of material in four areas: (1) an overview of the historic application of the law in this area from 1911 to 1995; (2) the development of the law in *Birklid* (1995) and its progeny; (3) a matrix of factors and fact patterns which the courts have found to support or negate a finding of "deliberate intention" in the context of corporate conduct; and (4) an analytic construct to assist in the consistent application of the *Birklid* principle in the future. In sum, this article seeks to serve as a guide to bench and bar in order to facilitate an orderly and principled development of the law of "something more."

I. Overview of the History of the "Deliberate Intention" Exception Pre-*Birklid*

A. The "Great Compromise" of 1911 and Abandonment of the Common Law

Nearly 90 years ago, in the "great compromise" of 1911, the Industrial Insurance Act (IIA) was born in the Washington Legislature. The enactment of the IIA gave rise to an administrative alternative



to the common-law system of compensation aimed at providing relief for "accidents" in the workplace. In the most general terms, the employer traded common-law defenses[3] to liability existing at the turn of the last century for a "no fault" administrative system providing limited compensation according to a schedule of damages. After all these years, what is most surprising is how many workers are surprised to learn that workers' compensation is their exclusive remedy and how few have been schooled in the mythos surrounding the birth of the Industrial Insurance Act. This is the official version:

> [O]ur act came of a great compromise between employers and employed. Both had suffered under the old system, the employers by heavy judgments of which half was opposing lawyers' booty, the workers through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was a cost of production, that the industry should bear the charge. *Newby v. Gerry*, 88 Wash. App. 812, 816 (1984).

B. The Jenkins-Delthony Standard for Finding Intentional Injury by Employers

Washington courts, for the better part of the last century, looked to Oregon for their interpretation of the "deliberate intention" exception. Not only did Oregon and its younger sister state, Washington, enjoy a natural affinity and shared history, but Oregon's statute contained language virtually identical to that of Washington.[4] It followed, when Mr. Delthony was injured in his workplace by an exploding boiler and contended that his employer's knowledge of the dangerous and unsafe condition of the boiler rose to the level of deliberate intent, that the Washington court looked south for guidance. *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 300, 205 P. 379 (1922).

The Oregon precedent embraced by the Washington court had been established six years before in *Jenkins v. Carman Mfg. Co.*, 79 Ore. 448, 155 P. 703 (1916). Jenkins had been injured by a broken log roller, which threw a piece of lumber at him. Jenkins' employer failed to repair the broken roller for a year before Jenkins' injury. The Oregon court found the employer's decision to risk the "danger of injury" to its employees did not rise to the level of an employer deliberately intending to produce such injury. As such, the court interpreted the "deliberate intention" exception to apply in only the most narrow of circumstances: "If defendant deliberately intended to wound plaintiff or his fellow workman and intentionally used this broken roll as he would have used an axe or a club to produce the injury, it is liable; otherwise it is not."

Relying upon three murder cases to develop its definition of "deliberate intention," the Jenkins court focused on deliberation and premeditation as applied in the criminal law in appraising an employer's actions rather than intentional tort standards. The specific language from the *Jenkins* holding which was to serve as a touchstone for Washington courts[5] for over 80 years is:

> We think by the words "deliberate intention to produce injury" that the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be *specific intent,* and not merely carelessness or negligence, however gross. *Jenkins*, at 453, 454.

The Washington State Supreme Court denied Delthony's attempt to overcome summary judgment and to present his case to a jury.

C. Washington Cases Rejecting a Finding of Intentional Injury

With few exceptions [see §I.D. infra], an overview of the application of the deliberate intention exception in Washington state presents an unrelieved landscape of denial of workers' claims based upon the *Jenkins-Delthony* holding.

In *Biggs v. Donovan-Corkery Logging Co.*, 185 Wash. 284, 285, 54 P.2d 235 (1936), a statute governing the maximum safe working load for cables and requiring that use be discontinued when cables suffered damage or deterioration was violated. A day or two before the accident, an engineer called the attention of the superintendent of the employer to the condition of the line, which had been badly burned in a forest fire three years before, and told him that it was not fit for use. The superintendent laughed and continued to use the same line. As one familiar with review of this body of case authority comes to expect, shortly thereafter the cable broke, causing injuries to Biggs' left arm, wrist and hand. The *Biggs* court declined to depart from the *Delthony-Jenkins* analysis. Case dismissed.

Winterroth's employer received six Department of Labor and Industries correction orders prior to Winterroth's hand becoming caught in a meat grinder without a safety guard. The court held: "One may be guilty of serious and willful misconduct by knowingly refusing to comply with a statute or rule intended to protect a workman without necessarily having a 'deliberate intention to produce such injury' to the employee." *Winterroth v. Meats, Inc.*, 10 Wn. App. 7, 12, 516 P.2d 522 (1973).

Higley was sitting in the quad saw operator's cage located in direct line with

the saw's rotating cutter head at a Weyerhaeuser mill. A piece of the cutter head broke loose, breaking through a Plexiglas shield and driving a piece of the shield into Higley's right eye. The complaint alleged that "the negligence and acts of omission on the part of [Weyerhaeuser] was so gross and irresponsible as to become tantamount to that of an intentional act." Notwithstanding allegations regarding the frequency of flying cutter heads and the inadequacy of safety shielding, even a high risk of injury rising to the level of substantial certainty would not suffice to demonstrate deliberate intent. The court reaffirmed its decision in *Winterroth. Higley v. Weyerhaeuser Co.*, 13 Wn. App. 269, 270, 272, 534 P.2d 596 (1975).

Foster, employed by defendant Allsop Automatic, Inc., operated a 90-ton hydraulic punch press equipped with a two-handed tripping device, which required the operator to use both hands to activate the press, thus keeping hands away from the moving parts of the machine. This safety device often was circumvented by placing a screwdriver in one of the tripping switches so that the press could be activated with only one hand. The shift supervisor was aware of this practice and told plaintiff that this was proper. When Foster became momentarily distracted while operating the press with one hand, his other hand was struck by the press. The court held that Foster had not "submitted facts from which a reasonable inference could be drawn that defendant possessed the specific intent to produce injury required by the statute." *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 585, 547 P.2d 856 (1976). The required intention was held to relate to the injury, not the act causing it. *Foster* at 584.

In *Peterick v. State*, 22 Wn. App. 163, 189, 589 P.2d 250 (1977), *review denied*, 90 Wn.2d 1024 (1978) *overruled on other grounds, Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985), explosion of a liquid explosive killed two workers. The court made it clear that violation of safety standards does not establish deliberate intention to injure:

> Here, the plaintiffs' allegations of calculated evasionary conduct in violation of recognized safety standards, even if taken as true, failed to meet the burden set forth in *Winterroth*, *Higley* and *Foster*. The plaintiffs have not produced evidence that the employer had a specific intent to injure the decedents, and therefore they cannot claim that their cases come within the statutory exception of RCW 51.24.020.

Nielson was unloading chemicals from a railroad car at a fertilizer plant operated by Wolfkill Feed & Fertilizer Corporation. A screw auger pushed the chemicals from an opening under the railroad tracks through a metal trough into a warehouse. Because the auger was prone to jamming, it was typically operated with its cover removed in order to observe the flow of chemicals through the trough. As Nielson was shoveling fertilizer at the edge of the trough, he slipped and fell, catching his foot in the rotating blades of the auger. The auger pulled him into the trough, amputating both legs and an arm. It was determined that Wolfkill had violated safety regulations by operating the auger without a cover. Nielson brought suit against Wolfkill, alleging that his injuries were occasioned by the "intentional and malicious conduct" of Wolfkill. *Nielson v. Wolfkill Corp.*, 47 Wn. App. 352, 734 P.2d 961 (1987). Case dismissed.

D. Washington Cases Finding Intentional Injury

Shortly after *Delthony*, the Washington State Supreme Court decided *Perry v. Beverage*, 121 Wash. 652, 659, 209 P. 1102 (1922). Perry's supervisor, Beverage, struck Mr. Perry on the left side of the face with a ceramic pitcher. Asked how hard he had struck Mr. Perry, the supervisor responded: "I struck him with all my might. I don't know just how hard I did strike him." Based upon this testimony, the court held that the jury was entitled to find a deliberate intention to cause injury.[6]

Six decades later, Newby sued his employer, claiming that his co-worker/supervisor, defendant Gerry, had approached him from behind, shouted, and grabbed him by the ankles, causing him to fall from the scaffolding. *Newby v. Gerry*, 38 Wash. App. 812, 819, 690 P.2d 603 (1984). For the first time since *Perry* (1922), a Washington appellate court allowed a worker to survive a motion for summary dismissal to have the facts of his case heard by a jury. The *Newby* court made an important policy statement: "Compensating worker-victims of intentional torts by employers, and forcing those employers to pay for intentional injuries they inflict, predominates over the need for a swift and sure remedy for workplace injuries."

Lonnie Barrett, the "lead person" on a forklift crew, had a disciplinary tool for crewmembers that proved problematic for his employer: "ramming by forklift." Having used this technique on numerous occasions, on one occasion Mr. Barrett drove a forklift truck with a drum on it into Mr. Mason's back, pinning him against another drum that Mr. Mason was cleaning, causing permanent back injuries. The focus of the inquiry concerned whether Barrett was operating within the scope of his supervisory duties, not whether he had intended injury; summary judgment dismissing the claim was reversed based on a question of fact respecting this question. *Mason v. Kenyon Zero Storage*, 71 Wash. App. 5, 11, 856 P.2d 410 (1993). Mr. Barrett's deliberate intent was not disputed. *Id.* at 9.

These three cases form the complete body of Washington case authority finding a deliberate intention to cause injury until *Birklid* (1995). Thus, we see in this review a justification for Justice Talmadge's conclusion in *Birklid v. Boeing*, at 861-62: "In summary, our courts have found 'deliberate intention' only when there has been a physical assault by one worker against another. Our courts have effectively read the statutory exception to the IIA's exclusive remedy policy nearly out of existence."

E. Themes Developing in Other Jurisdictions

1. The Evolution of Oregon Law: the "Conscious Weighing" Test

After *Jenkins v. Carman Mfg. Co.*, Oregon law began to evolve in the face of challenging cases, while Washington courts continued to follow, undiluted, the Oregon direction established in *Jenkins*. In *Weis v. Allen*, 147 Ore. 679, 35 P.2d 478

(1934), employer Allen set spring-loaded guns on his property in an attempt to prevent burglaries and, that failing, to injure the intruders. Before Weis was injured, a watchman had been injured and Allen had been told by the police to take the guns down. Allen asserted that there was no evidence of any deliberate intention on his part to inflict the injury suffered by Weis.

The court distinguished *Weis* from *Jenkins*, *Heikkila* and *Delthony* and permitted the case to survive summary judgment: "The fact that the defendant was, with knowledge and in defiance of the law, maintaining spring guns, shows wantonness on his part...." The court, overlooking the apparent absence of a specific intent to cause injury to *an employee*, held:

> It was not necessary here to prove that the defendant had singled the plaintiff out and set the gun with the express purpose of injuring him and no one else. The act which the defendant did was unlawful and was deliberately committed by him with the intention of inflicting injury." *Id.* at 681-82.

It must be noted that the *Weis* court flirts with, but does not embrace, the language of a Texas "spring gun" case:

> Every man is held to the necessary, natural, and probable consequences of his act, the contemplation of which the law presumes, whether or not he does so in fact.[7]

To do so would have moved Oregon from the specific intent to cause injury to a species of "constructive" intent.

Later cases would continue to try the Oregon courts' resolve.

Painting mobile homes fabricated by his employer, Mr. Lusk "worked in a cloud of paint mist and vapors." *Lusk v. Monaco*, 97 Ore. App 182, 184, 775 P.2d 891 (1989). Lusk became sick from working with the paint and ultimately was permanently disabled and was unable to work as a painter. The court expressly rejected the plaintiff's argument under Restatement (Second) Torts, § 8A, comment b, that if "[d]efendant knows [that] the consequences of his refusal to provide a fresh air supply to a painter ... are 'substantially certain' to occur, yet he still refuses to provide one, 'he is treated by the law as if he had in fact desired to produce the result.'" The court concluded that plaintiff wrongly interpreted the statutory standard by assuming that the statutory phrase "deliberate intention ... to produce such injury" established the same standard as does the term "intent" in the common law of intentional torts. *Id.* at 186. Yet, Lusk was allowed to present his case to the jury because the jury could infer specific intent to cause injury from the fact that his employer had had an opportunity to consciously weigh the risks to its employee and still subjected him to dangerous conditions:

> The affidavits suggest that defendant failed to provide the respirator because of the cost. Such a reason, while perhaps not laudable, is not a specific intent to produce an injury. However, the trial court on summary judgment, like a jury, need not accept defendant's proffered reason in isolation. Specific intent to injure may be inferred from the circumstances. [Citation omitted]. Here, a jury could infer, from all of the circumstances, that defendant failed to provide the respirator because it wished to injure plaintiff: Defendant knew that the paint was highly toxic and that plaintiff's resulting injury was substantial and continuing; it did not follow the warnings of the paint manufacturer and the urging of its insurer to furnish a supplied-air respirator; plaintiff and his supervisor had complained about the problem repeatedly; and the cost of proper, available equipment (which defendant knew would soon be required by the state) was not prohibitive. A specific intent to produce injury is not the only permissible inference to be drawn from defendant's apparent obstinacy, but it is one that a jury should be permitted to consider.... The trial court erred, therefore, in granting defendant's motion for summary judgment. *Id.* at 189.

In *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195, 196-197 (9th Cir. 1989), a transformer failure released a toxic level of polychlorinated biphenyls (PCBs) onto the floor of Crown Zellerbach's mill in West Linn, Oregon. After three attempts by hazardous waste specialists failed to

reduce the PCB level to nontoxic levels, Crown Zellerbach ordered employees Robert Gulden and Gregory Steele to finish the cleanup by scrubbing the floor while on their hands and knees without protective clothing. Both workers acquired body levels of PCBs beyond that considered safe. The 9th Circuit converted the *Lusk* opinion into a trend by permitting a jury to consider whether Crown Zellerbach had a deliberate intention to injure Messrs. Gulden and Steele. The 9th Circuit concluded:

> Under Oregon law, a jury could conclude that the intention to injure — in this case, to expose Gulden and Steele to toxic levels of PCB — was deliberate where the employer had an opportunity to weigh the consequences and to make a conscious choice among possible courses of action.

2. The "Substantial Certainty" Test: *Beauchamp v. Dow* (1986)

Unlike Washington, the Michigan workers' compensation statute failed specifically to exclude intentionally caused injuries from the ambit of the act. Nonetheless, *in Beauchamp v. Dow*, 427 Mich. 1, 11, 398 N.W.2d 882 (1986), where a research chemist claimed injury from exposure to "Agent Orange," the court, focusing on the original legislative intent of the act to compensate for *accidental* injury, concluded that the exclusive remedy provision "does not preclude an action by an employee who alleges that his employer committed an intentional tort against him." In order to prevent a corporation from costing out "an investment decision to kill workers," the court adopted the "substantial certainty" standard of liability. *Id.* at 25, quoting *Blankenship v. Cincinnati Milacron Chemical*, 69 Ohio St. 2d 608 (1982). "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." *Beauchamp* at 22.

Within 142 days of the *Beauchamp* opinion, the Michigan Legislature amended the Michigan deliberate intention statute to narrow the standard created by the court.[8]

Michigan authority would have little interest to us today, were it not for the fact that the Washington Supreme Court would adopt the Michigan statutory language as its own when crafting the *Birklid v. Boeing* decision eight years later.

II. *Birklid v. Boeing* and its Progeny

A. Birklid v. Boeing: *"There is no accident here."*

Seventeen Boeing factory workers contended that their employer had intentionally exposed them to toxic phenol-formaldehyde fumes arising from sheets of pre-impregnated space-age composites (pre-preg) and that they had suffered injury as a result. The pre-preg materials would be removed from refrigeration, where they had been placed to keep volatile vapors from off gassing and the material from curing prematurely, and workers would pull off, cut and shape sections of the phenolic pre-preg, often using a heat gun to increase malleability. They would work without respirators and often without gloves. Interior aircraft parts would be fabricated by the "laying up" of ply upon ply of the material. The building where fabrication was done was a vintage structure reportedly used as a morgue during the Second World War; it was cold in the winter, and during summer months, temperatures rose to nearly 110 degrees Fahren-

heit, as confirmed by Boeing internal documents. On more than one occasion, workers collapsed at their workstations and were removed by ambulance. Workers reported illness shortly following the introduction of the novel composites into the workplace, as was confirmed in Boeing internal memoranda. One memo from a Boeing supervisor requested additional ventilation, noting:

> During MR & D [Material Research and Development] lay-up of phenolic pre-preg, obnoxious odors were present. Employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach. We anticipate this problem to increase as temperatures rise and production increases.

The request for ventilation was denied the following month: "The odor level of the phenolic prepregs relative to other materials currently used ... does not warrant expenditure of funds for additional ventilation at this time."

Affidavits from workers stated that Boeing refused to heed worker reports of illness, denying any relationship between the composite materials and illness; discouraged workers from reporting symptoms to Boeing medical; threatened workers with medical restrictions with termination unless their restrictions were "pulled"; removed product labels; refused or failed to provide safety equipment or access to Material Safety Data Sheets (MSDS); and initiated changes in workplace conditions and production in advance of air monitoring by government agencies — with conditions being restored to the pre-inspection condition immediately thereafter. Production continued.

In 1991, the workers filed suit in King County Superior Court and the action was promptly removed by defendants to the United States District Court for the Western District of Washington. The district court judge, applying Washington law on motion by defendant Boeing, dismissed the intentional injury claim as failing to meet the "deliberate intention" standard under RCW 51.24.020. Plaintiffs appealed to the 9th Circuit Court of Appeals, which certified the issue to the Washington Supreme Court as follows:

> Whether the evidence produced by the plaintiffs in their response to the motion for summary judgment could, under Washington law, justify a jury in finding the "deliberate intention" exception specified in RCW 51.24.020, and, if so, the requirements of Washington law to permit such a finding?

The Washington Supreme Court had come to recognize that the case law preceding *Birklid* created a nearly impossible standard for an injured worker to meet, even in circumstances that would constitute an intentional tort under ordinary tort principles.[9] In oral argument, plaintiffs' counsel contended that the existing law was designed "to make it difficult, but not impossible" to find deliberate intention on the part of an employer. But, absent a corporate directive to injure workers, how could such deliberate intention be demonstrated?

Boeing counsel submitted its own formulation, arguing that "[e]vidence that an employer has deliberately engaged in conduct that results in occupational injuries or disease within its workforce is *not* evidence of deliberate intent to injure members of that workforce for purposes of RCW 51.24.020 so long as that conduct was reasonably calculated to advance an essential business purpose." Plaintiffs'

counsel responded that such a standard would permit industry to sacrifice employees to its business purposes and would subjugate the welfare of workers to the profit motive of their employer. This, counsel argued, would undermine the public policy underlying RCW 51.04.010, which states: "The welfare of the state depends upon its industries, and even more upon the welfare of its wageworker."

After a review of existing law, Justice Talmadge, writing for a unanimous court, for the first time since *Delthony*, undertook to explain what constituted deliberate intention to cause injury with these words: "The facts in the case at bar serve to illuminate the meaning of the statute."

> The central distinguishing fact in this case from all the other Washington cases that have discussed the meaning of "deliberate intention" in RCW 51.24.020 is that Boeing here knew in advance its workers would become ill from the phenol-formaldehyde fumes, yet put the new resin into production. [Footnote omitted.] After beginning to use the resin, Boeing then observed its workers becoming ill from the exposure. In all the other Washington cases, while the employer may have been aware that it was exposing workers to unsafe conditions, its workers were not being injured until the accident leading to litigation occurred. There was no accident here. The present case is the first case to reach this court in which the acts alleged go beyond gross negligence of the employer, and involve willful disregard of actual knowledge by the employer of continuing injuries to employees. *Id.* at 863.

The Court declined to adopt either the "conscious weighing" test of the Oregon courts or the "substantial certainty" test adopted in Michigan, South Dakota, Louisiana and North Carolina, stating: "[w]e are mindful of the narrow interpretation Washington courts have historically given to RCW 51.24.020, and of the appropriate deference four generations of Washington judges have shown to the legislative intent embodied in RCW 51.04.010." *Id.* at 865. The Court adopted in part, the statutory language crafted in the Michigan Legislature in reaction to the *Beauchamp* decision: "We hold the phrase 'deliberate intention' in RCW 51.24.020 means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* at 865.

B. The Birklid *Progeny: Washington Cases Finding "Deliberate Intention"*

Since *Birklid*, application of the "deliberate intention" exception has been presented to Washington trial courts in the context of motions for summary judgment. Washington appellate courts have now had the opportunity to review the application of the *Birklid* standard, and these cases are instructive.

In *Baker v. Schatz*, 80 Wash. App. 775, 782-84, 912 P.2d 501 (Div. 2)(1996), the first Washington post-*Birklid* case, the Court of Appeals affirmed the denial of defendant employer General Plastics' motion for summary judgment on two distinct grounds. First, although General Plastics had expressly denied that it intended to injure any employee, which before *Birklid* would have established a *prima facie* case and shifted to the worker the burden to produce facts creating a genuine issue of the employer's "deliberate intention" to injure its employee, the court held management might still have known that injury was certain to occur,

and might willfully have disregarded that knowledge. Since General Plastics never demonstrated the absence of an issue of material fact, it had never made out a *prima facie* case, and the burden never shifted to the employees to produce any evidence to oppose summary judgment. The court held: "We could uphold the denial of summary judgment on this ground alone."

Second, plaintiffs alleged that General Plastics' supervisors knew that the employees were suffering from chemical-related illnesses and that, unless the working environment was changed, continuing injury was certain. Plaintiffs alleged that, although the plant supervisors knew that the Material Safety Data Sheet (MSDS) for methylene chloride stated that one should avoid skin contact with the substance, supervisors instructed them to wash their hands and arms with methyl chloride. Management admitted that employees complained repeatedly to General Plastics' supervisors that the chemicals in the plant were causing health problems. The evidence supported inferences of continuing injury: that supervisors "had actual knowledge that the plant's practices with regard to methylene chloride exposed employees to certain, continuing injury" and "that General Plastics willfully disregarded the knowledge that the working environment at the plant would cause continuing injury to its employees." *Id.* at 783.

These facts, together with the absence of evidence that the employer undertook to alter or improve the working environment at the plant, were sufficient to create a genuine issue whether General Plastics willfully disregarded knowledge that the chemical environment at the plant was injuring its workers. *Id.* at 784.

In *Stenger v. Stanwood School District*, 95 Wash. App. 802, 804, 977 P.2d 660, 134 Ed. Law Rep. 1036 (Div. 1)(1999), the court reversed the trial court dismissal, noting:

> Here, the appellants have produced evidence that the district knew its employees would continue to be injured by the student, despite their efforts to modify his behavior or restrain him. Notwithstanding this knowledge, the district continued to require its employees to work with the boy, and the appellants were seriously injured. We

conclude that the evidence in its entirety would permit a trier of fact to conclude that the appellants have satisfied the test for intentional injury....

The plaintiffs worked for the Stanwood School District as instructional aides in special education classes and were injured while working with a severely disabled special education student. The *Stenger* court analyzed the Birklid rule as a two-pronged test: (1) actual knowledge of certain injury, and (2) willful disregard of that knowledge.

Evidence of actual knowledge of certain injury was supported by testimony that the student caused between 1,316 and 1,347 injuries to district staff, inflicting injuries almost on a daily basis. The injuries included scratches; gouges; bites; upper body strain; scalp, breast, neck, back, shoulder, leg, arm, wrist, hand and finger injuries; and bruising. Six accident reports documenting neck, back, arm strain, and shoulder injuries were submitted between 1992 and 1995, and three Labor and Industry (L&I) claims, including one for a back, neck and side injury, were filed in the three years prior to Stenger's injury.

To meet the second prong of the *Birklid* test, plaintiff presented facts that both the director of special services and the assistant principal were aware of the injuries to staff and believed that despite their precautions, the staff would continue to suffer some level of injury from working with the student. Since the school district did not pursue any other placement alternatives for the student despite his repeated attacks on other students and staff, and chose not to follow an assessment indicating a more restrictive placement for him, the court held that the determination of the adequacy of the district's response was not appropriate for summary judgment and should be a question for the trier of fact.

C. The Birklid *Progeny: Washington Cases Not Finding "Deliberate Intention"*

In *Atkinson v. United Parcel Service*, 96 Wash. App. 1042, 1999 WL 504196 Wash. App. (Div. 2, Jul 16, 1999), plaintiff UPS drivers asserted that UPS's conduct in refusing to allow them to use hand trucks for loads under 70 pounds "suggests that the employer may be engaging in a deliberate intent to injure these employees." Summary dismissal was upheld: "Because the drivers failed to adduce any evidence showing that UPS knew the drivers would be injured if they did not use a hand truck, summary judgment on this claim was proper."

In *Goad v. Hambridge*, 85 Wash. App. 98, 100-01, 931 P.2d 200 (Div. 3, Feb 18, 1997), Mr. Goad's hand was severely injured when he reached in to remove a loose piece of wood from the planer at Springdale's sawmill. The Goads later sued Springdale and its owners, alleging Springdale willfully and deliberately failed to make the equipment safe and to warn of dangers associated with it.

> [A]ll persons who operated the planer (including Mr. Goad) were told not to reach into the machine while it was operating. Mr. Goad admitted he was aware of the danger of reaching into the machine, and it would have been easy for him to shut it down before reaching inside. He characterized his action as a "lapse in thought" resulting from "absent-mindedness," but testified he would not have reached inside if Springdale had placed more emphasis on safety, installed guards and warn-

ing signs, and instituted a lock-out procedure. Mr. Goad conceded no one instructed him to reach into the planer, nor did he believe anyone wanted him to be hurt. *Id.*

The Goads presented no evidence that Springdale had actual knowledge that Mr. Goad's injury was certain to occur. At best, Springdale knew of the potential of an injury similar to Mr. Goad's, which was held insufficient to satisfy the *Birklid* standard.

In *Henson v. Crisp*, 88 Wash. App. 957, 946 P.2d 1252, 1253-54, 13 IER Cases 890 (Div. 3, Dec 2, 1997), even drawing all inferences favorable to the nonmoving party, summary dismissal was upheld. Intentional pointing and firing of a toy gun at the plaintiff, while intended to produce a mild startled response, allegedly resulted in severe emotional distress. Plaintiffs contended that Mr. Crisp intended to produce the kind of injury Ms. Henson suffered, and that the fact that he did not intend the extent of the injury was immaterial. But, citing *Foster v. Allsop Automatic, Inc.*, *supra*, the court held that it was the injury, not merely the conduct, which must be intentional. The court held: "*Birklid* expands the definition of intentional injury beyond assault and battery, but not enough to include this claim." Summary judgment was appropriate, as "Ms. Henson presented no evidence Mr. Crisp had actual knowledge she would suffer prolonged and incapacitating emotional distress in response to his prank."

Estates of two fast-food restaurant employees murdered during a restaurant robbery sued the employer, the restaurant franchiser and a security firm. The Superior Court, Spokane County, granted summary judgment to franchiser and security firm, but denied the employer's summary judgment motion as to immunity under the Industrial Insurance Act (IIA). Petitions for discretionary review were granted. The Supreme Court held the evidence did not support a finding of the employer's "deliberate intention" to cause employees' injuries, and thus, the employer did not lose civil suit immunity under IIA. The evidence that the employer may have known that the security system was no longer active, that keeping cash in the restaurant may invite a robbery, and that the former employee who committed the murders had a criminal history of violent felonies did not demonstrate actual knowledge of certain injury. *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998).

D. Relevant Out-of-State Authority Regarding "Deliberate Intention"

Michigan authority interpreting the statutory language from which *Birklid*'s holding was derived continues to be of value.

Travis v. Dreis & Krump Mfg. Co., 453 Mich. 149, 551 N.W.2d 132 (1996), presents a fascinating juxtaposition of two cases consolidated for review.[9] In *Travis*, the court did not find evidence sufficient for the question of deliberate intention to cause injury to be considered by a jury; in *Golec*, with which it was consolidated on appeal, the court did. Both cases presented an opportunity to observe application to a corporate employer of the standard established by the Michigan statute from which the language of *Birklid* was derived.

> A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the

employer deliberately did or did not do. *Id.* at 173-74.

The *Travis* court took care to clarify the statutory standard of actual knowledge of certain injury and willful disregard of that knowledge. The court correctly noted that: "[j]ust because something has happened before on occasion does not mean that it is certain to occur again. Likewise, just because something has never happened before is not proof that it is not certain to occur." *Id.* at 174. Conclusory statements by experts to the effect that injury is substantially certain to occur are insufficient to allege the certainty of injury required by the statute. *Id.* at 175.

What does it take for an employer to have knowledge of "certain injury" according to the *Travis* court? The facts in *Gulden v. Crown Zellerbach Corp.*, discussed *supra*, were deemed sufficient to allege certainty of injury. Another example of factual circumstances giving rise to "certain injury" according to the *Travis* court were those set out in *People v. Film Recovery Systems*, 194 Ill. App.3d 79, 141 Ill. Dec.44, 550 N.E.2d 1090 (1990) as discussed in *Beauchamp*, *supra* at 23 and by Professor Larson in his treatise on workers' compensation. 2A Larson, Workmen's Compensation, § 68.15(e), pp. 13-105 to 13-106.

Despite this knowledge of a specific danger and of other burn injuries sustained in the past, the employer ... ordered Mr. Golec to continue loading the wet scrap that contained pressurized canisters into the furnace vat with an unshielded tractor while not properly attired with protective clothing.

Film Recovery Systems was in the business of recovering silver from film negatives by placing the negatives into vats of cyanide.

> [W]orkers were not told that they were working with cyanide or that the compound put into the vats could be harmful when inhaled; although ceiling fans existed above the vats, ventilation in the plant was poor; workers were not informed they were working with cyanide and were given no safety instruction; workers were given no goggles to protect their eyes; workers were given no protective clothing and, as a result, workers' clothing would become wet with the solution used in the vats; there were small puddles of that solution as well as film chips on the plant floor around the vats; the solution burned exposed skin; a strong and foul odor permeated the plant; the condition of air in the plant made breathing difficult and painful; and, finally, workers experienced dizziness, nausea, headaches, and bouts of vomiting. *People v. Film Recovery Systems*, *supra* at 90-91.

Eventually, one worker died and several others were seriously injured because of cyanide poisoning. The corporate officers were convicted of involuntary manslaughter. *Beauchamp*, *supra* at 427 Mich. at 23-24, 398 N.W.2d 882 (1986). Considering these facts, the *Travis* court, quoting Professor Larson's analysis, stated:

> [T]he fumes ... were continuously operative, and the employer knew it.... The exposure to fumes did in fact occur. The only possible "unknown" might have been the effect of inhaling the fumes, but this unknown was removed by the plain warning on the package. The hiring of only workers who could not read warning labels confirms that the employer wanted those

	Birklid v. Boeing (1995)	Baker v. Schatz (1996)	Golec v. Metal * (1996)	Travis v. Dreis* (1996)	Goad v. Hambridge (1997)	Henson v. Crisp (1997)	Folsom v. Burger King (1998)	Stenger v. Stanwood (1999)
Deliberate Intent Exception Applied	Yes	Yes	Yes	No	No	No	No	Yes
Number of Employees								
One employee			X	X	X	X		
More than one employee	X	X					X	X
Type of Injury								
Accident (1 shift)			X	X	X	X	X	
Occupational disease (more than 1 shift)	X	X						X
Cause of Injury								
Toxic chemical	X	X						
Equipment/materials			X	X	X			
Co-worker						X		
Former employee							X	
Student								X
Employer's Actual Knowledge								
Internal memoranda	X							X
Grievances/complaints/reports	X	X	X	X	X		X	X
Employee requests for protective equipment	X	X						
Employee(s) injured under similar conditions	X	X	X					X
Continuously operative dangerous condition	X	X	X					X
Employer's Willful Disregard								
Failure to correct dangerous condition/concealing/denial	X	X	X	X			X	
Employer orders employees to work despite safety risk	X	X	X				X	

* MICHIGAN cases with valuable analysis: *Golec* and *Travis* consolidated on appeal.

employees to continue to inhale these and suffer these known consequences. A court could well say that this amounted to intending the injury. [2A Larson, Workmen's Compensation, § 68.15(e), pp. 13-105 to 13-106.]

We agree with Professor Larson's reasoning. When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a fact finder may conclude that the employer had knowledge that an injury is certain to occur. *Travis, supra* at 178.

The court, with this clarification in hand, denied plaintiff Travis' recovery for serious hand injuries from a malfunctioning press which would descend a second time even when the operator's hands were below. (Recall *Foster v. Allsop Automatic, Inc., supra.*) Although the supervisor had actual knowledge that the press was malfunctioning, he did not have knowledge that an injury was certain to occur. While concealing a known danger from a novice employee who has no independent knowledge of the danger may be evidence of an intent to injure "in this case, unlike *Film Recovery, supra,* plaintiff was not required to confront a continually operating dangerous condition. The press double cycled only intermittently... the press cycled so slowly that no one had ever been injured when the press double cycled previously. All prior operators were able to withdraw their hands in time. We find that an injury was not certain to occur because plaintiff was not required to confront a continuously operating dangerous condition." *Id.* at 182. The court concluded:

> Unlike a situation in which an employer orders an employee to confront a continuously operating danger while concealing the danger from the employee, the evidence does not suggest that Clarke disregarded a continuously operative dangerous condition that would lead to certain injury. *Id.* at 183.

By contrast, in *Golec v. Metal Exchange Corp.*, 208 Mich. App. 380, 384 (1995), consolidated on appeal in *Travis, supra,* the worker's claim was not barred on summary judgment by the exclusive remedy provision of the Worker's Compensation Act. Mr. Golec, a furnace loader, sustained injuries during course of his employment when an explosion in the furnace caused molten aluminum to splash on him. Golec alleged that the employer knew that the roof leaked over the scrap aluminum, which caused the scrap he was instructed to load into the furnace to become wet, and knew that wet aluminum can cause an explosion of molten aluminum that can cause burn injuries. Additionally, Golec alleged that his employer knew that sealed canisters were contained in the pile of scrap and that these canisters would also cause an explosion of molten aluminum if placed in the vat. The Metal Exchange Corporation also knew that Golec was not wearing proper protective clothing, that he was working by supervisory directive in an unshielded tractor, and that he had been injured earlier that same shift from an explosion of molten aluminum.

Despite this knowledge of a specific danger and of other burn injuries sustained in the past, the employer, through the chain of command, ordered Mr. Golec to continue loading the wet scrap that contained pressurized canisters into the furnace vat with an unshielded tractor while not properly attired with protective clothing. The defendant argued that while it may have been negligent to require the plaintiff to load wet scrap containing aerosol cans, the defendant did not willfully disregard a certain injury because no explosion of this magnitude had occurred previously. While this is true, plaintiff presented evidence that, despite knowledge of the earlier explosion, defendant failed to remedy the condition that caused it. *Id.* at 186.

III. The Matrix: Facts and Factors Supporting or Negating a Finding of Deliberate Intention to Cause Injury on Summary Judgment

The matrix on page 38, even on a cursory examination, suggests a nexus between the presence of certain factual findings and application of the exception for deliberate intention articulated in *Birklid.* Although logically, deliberate intention to cause injury does not require that other

employees have been injured before the plaintiff seeking a remedy, it is undoubtedly true that the two most potent factors establishing actual knowledge of certain injury are a history of injury to other workers similarly situated and the presence of a continuously operative dangerous condition. Thus, as the Michigan court stated: "We do not conclude that an injury resulting from a single highly risky task could not, under appropriate circumstances, form the basis of a claim for relief. [T]he continuation of risk with knowledge of its dangerous characteristics thus allows a circumstantial inference of intent sufficient to state a claim." *Travis*, *supra* at 181.

Actual knowledge of a history of injuries antecedent to that giving rise to the case at issue, when combined with denial or concealment of risks and a failure to address the injury-producing conditions, has consistently triggered application of the exception. An employer affirmatively requiring a worker to enter unknowingly into a zone of danger or, through inaction, permitting a worker to be exposed to continuously operative dangerous conditions, may equally serve to establish a willful disregard for worker safety.

The *Travis/Golec* cases considered by the Michigan court bring into sharp focus the significance of a continuously operative dangerous condition. Recall that *Travis* fell short in large part because the press was only "intermittently" hazardous and because other workers had been able to move their hands out of danger before the malfunctioning press crushed them. How fast would the press have to descend in order for injury to become certain? This is the same issue as that presented in *Higley v. Weyerhaeuser*: with what frequency must flying cutter heads hit inadequate shielding in order to become a continuously operative dangerous condition? In *Stenger*, how often must the student attack his instructional aides before an intermittent hazard is transformed into a continuously operative dangerous condition?

These questions are not merely rhetorical. The difficulty we have in responding to them reveals an irresolvable "gray area" in the law that reflects the statistical nature of "intentionality" itself. The whole notion of intentionality in the real world (including, undoubtedly, the workplace) is circumscribed by the "law of unintended consequences." The only reason we can say that we "intend" to do something is that experientially there is a fair correlation between our intentions and our actions and the outcomes realized. In a chaotic universe, were our intentions to become disconnected from the outcomes achieved, notions of intentionality would dissolve into statistical probabilities. Things which happened with high probability, or to put it another way, things which were the predictable outcome of specific actions would be deemed to have been intended on the part of the actor.

As Marcus Aurelius said: "[M]en sin without intending it." Yet, few things are more certain.

As Marcus Aurelius said: "[M]en sin without intending it." Yet, few things are more certain. We will consider below how *Birklid* enables us to fix responsibility on corporate conduct and to distinguish between actions properly characterized as "accidental" and properly characterized as "intentional" without being consumed by philosophy.

IV. An Analytic Framework: Accidental Injury in the Corporate Environment

The Industrial Insurance Act is intended to provide the exclusive remedy for *accidental* injuries. Injuries resulting from the *deliberate* intention of the employer have never been covered by the IIA. Immunity from tort liability under such circumstances would contravene the basic policy of the IIA to protect the wageworker. By spreading the cost of intentional torts among all employers contributing to the industrial insurance fund such immunity would insulate the wrongdoer from the consequences of its wrongs.

Distinguishing between "accidental" and "deliberate" injury is central. The *Birklid* court stated: "There is no accident here." *Id.* at 863. What, then, is an accident? In *Truck Insurance Exchange v. Rohde*, 49 Wash.2d 465, 469, 303 P.2d 659 (1956), the Washington Supreme Court held: "An accident is '... an undesigned and unforeseen occurrence of an afflictive or unfortunate character ...'" "Design" and "foreseeability" are antithetical to the notion of an accident.

In *Weis v. Allen*, the Oregon court recognized that a spring gun was designed to injure and that such injury was foreseeable, although its precise victim was not. Intention was found, despite the protestations of the employer as to his lack of specific intent.

In the corporate context, the workplace environment is likewise a product of design: the chemicals employed, the machinery installed, the safety equipment made available, the information disseminated are all exclusively subject to corporate authority. In the corporate context, injury becomes foreseeable based upon actual knowledge of the characteristics of chemicals, of Material Safety Data Sheets, of previous health reports or injuries, and knowledge of the hazards and dangers of the workplace environment.

If a corporation designs a workplace which has within it a continuously operative dangerous condition and injury is clearly foreseeable (if, indeed, it has not already occurred), then such an injury is the product of both design and foresight and cannot be properly termed "accidental." It is no more an "accident" than a spring gun set to discharge or a bucket of water set to spill on someone's head upon entering the room. In this sense, an "accident waiting to happen" which is foreseen or expected to occur by the employer and which arises from the employer's design is no accident at all.

The law does not distinguish between the instrumentality of harm when determining whether an injury was the product of accident or deliberate intention. Injury can equally be inflicted by a water pitcher, a pitchfork, a forklift – or toxic fumes. Yet, to a student of the subject matter, it is evident that there is something distinct about toxic chemical exposure cases which facilitates a finding of deliberate intention to cause injury. What differs is that the capacity of toxic fumes to injure is no accident and, unlike most machines, no defect or accident is required for toxics to manifest their harmful properties. The distinctive feature must surely be this: unlike a cable which snaps (Biggs), unlike a hand which slips beneath a descending punch press (*Foster*, *Goad* or *Travis*) or a meat grinder (*Winterroth*), a fall into an open hatch (*Nielsen*), a flying

cutter head (*Higley*), an explosion (*Delthony* or *Peterick*), and other foreseeable hazards, toxic chemical exposures have no intervening "accident" to disrupt the causal chain linking the design of the work environment, with its foreseeable and expected dangers, to the manifestation of risks foreseen. So it is that in *Baker*, *Lusk*, *Gulden*, *Beauchamp* and *Film Recovery*, it may be said, as it was in *Birklid*, "[t]here is no accident here."

Corporate liability for non-accidental injury should arise when the injury flows from a workplace environment designed by the employer with known or foreseeably harmful conditions where no intervening "accident" is required for the harm to become manifest. In other words, if the workplace designed by the employer has mechanical or human elements which, in the course of anticipated operations, generate injury, such injury cannot properly be regarded as "accidental."

Thus, in *Stenger*, the continuously present injury-producing condition presented by the special-education student, which resulted in over a thousand injuries on over a thousand occasions, became a feature of the working environment once aides were required to work in that environment without effective amelioration by their employer. This is not without precedent. In admiralty law, it has long been recognized that a crew member with a known propensity for violence and a vicious or savage disposition could, himself or herself, become an "unseaworthy condition" for which the vessel owner could become liable. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 339-40 (1955).

It is important to recognize that it is unnecessary to attempt to impute to the hazardous condition itself, whether it originates in purely mechanical operations or has a human component, independent intentionality. It is enough that the dangerous condition has become a continuously operative feature of the working environment with a known propensity for injury which is expected to manifest in the ordinary course without intervening negligence. Injury cannot be regarded as "accidental" in a workplace with spring guns, with car bombs which explode on ignition, with known toxic fumes generated during expected operations causing injury, or unfed and uncaged lions and tigers roaming the premises consuming workers.

Corporations are not human beings. Corporations act through their human employees, but are legal entities in their own right. Generating profit is the corporate raison d'être. Barring control of a corporate entity by a particularly beneficent or particularly evil human board of directors prone to issuing corporate directives and statements of purpose to the contrary, a "for profit" corporation has as its purpose maximizing the return to its shareholders. As Chaucer wrote in the *Pardoner's Tale*: "My speech is one and ever has been: Radix malorum est cupiditas." (The root of all evil is avarice.) So, too, corporate speech is one: profit. In *Lusk*, for instance, the corporate defense to the claim of deliberate intention to cause injury was that it denied respirators for reasons of cost, not for any specific intention to cause injury.

What is the compass for corporate conduct and conscience if not the "cost-benefit" analysis? Yet, it is apparent that the wageworker in Washington has no meaningful protection so long as corporate employers can sacrifice worker safety to profit and corporate plans are permitted to embrace inevitable worker injury as a cost of production. Compared with tort liability, the Industrial Insurance Act provides minimal financial disincentives for unsafe work practices. Tort liability for non-accidental injury provides an economic fillip for workplace safety consistent with the stated public policy of the IIA.

For over 80 years, workers were stymied by the fact that corporations are incapable of forming the same sort of personal animus or malicious motive as a rogue supervisor. So long as corporate tort liability was contingent upon workers establishing deliberate intention by the corporation to cause injury, corporations were immunized from the consequences of acts which, had they been done by humans, would have been regarded as intentional. The fact that a corporation is structurally incapable of harboring any "motive" other than maximizing profit to the shareholders renders it incapable, except in rare instances, of forming what we would regard as a specific intention to cause injury.

Birklid is properly viewed as a way to distinguish between "accidental" and "intentional" injury in the context of corporate entities and to pierce the legal fiction requiring us to find "intentionality" in corporate entities which lack the capacity to form "deliberate intention." When the *Birklid* court stated: "[D]eliberate intention" in RCW 51.24.020 means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge," a basis for finding corporate intentionality was found which made it difficult, but not impossible, to hold corporations accountable.

Thus, *Birklid* preserves the balance established by the Industrial Insurance Act:

> The grand compromise of 1911 established in Washington's Industrial Insurance Act remains intact. Although the court in *Stertz v. Indus. Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P.256 (1916), may have been correct in stating that in 1916 everyone "agreed that the blood of the workman was a cost of production," that statement no longer reflects the public policy or the law of Washington. *Birklid* at 873-74.

Randolph I. Gordon practices in Bellevue, Washington, currently serves on the adjunct faculty at Seattle University School of Law and, with Jim Hailey, was co-counsel for plaintiffs in the Birklid case. Both Randy and Jim were awarded the 1998 Public Justice Award from the Washington State Trial Lawyers Association for their work on Birklid; Randy would like to acknowledge the inestimable contributions made by Jim Hailey as co-counsel.

Amy F. Cook is scheduled to graduate from the Seattle University School of Law evening program in December 2000. Amy is a military police officer serving in the Washington National Guard at Camp Murray.

The authors wish to thank Washington State Supreme Court Justice Philip Talmadge and his judicial assistant, Bernie Friedman, for their comments and for their sharing a copy of the preparing memorandum in the Birklid case.

NOTES

1 RCW 51.04.010 ("... and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.")

2 Laws of 1911, ch. 74, §6; Laws of 1919, ch. 131, §5; Laws of 1927, ch. 310, §5; Laws of 1957, ch. 70, §24; Laws of 1961, ch. 23, § 51.24.020, now RCW 51.24.020.

3 Three common law defenses, sometimes called the "unholy trinity," existed to protect the early twentieth century employer: assumption of the risk, the fellow-servant doctrine, and contributory negligence. The first was based on the principle that the worker voluntarily agreed to as-

sume the dangers that normally arose incident to his employment; the second allowed an employer to escape liability when a worker was injured by the negligence of a co-worker; the third barred recovery for injured workers if the employer was able to show that the worker failed to exercise reasonable care for his own safety, however small the contribution of fault on the part of the worker – not to be confused with the modern-day version, which is properly called "comparative negligence." Legal historians, such as Prof. Morton Horwitz of Harvard Law School, have suggested that these defenses, soon discarded at common law, were invoked as a "subsidy" for industry during years of industrial expansion.

4 ORS 656.156 [Intentional injuries]: "If injury or death results to a worker from the deliberate intention of the employer of the worker to produce such injury or death, the worker, the widow, widower, child or dependent of the worker may take under this chapter, and also have cause for action against the employer, as if such statutes had not been passed, for damages over the amount payable under those statutes."

5 Delthony v. Standard Furniture Co., 119 Wash. 298 (1922); Biggs v. Donovan-Corkery Logging Co., 185 Wash. 284 (1936); Higley v. Weyerhaeuser, 13 Wn. App. 269 (1975); *see also* Heikkila v. Ewen Transfer Co., 135 Or. 631, 634 (1931) ("Reckless disregard of the consequences, for the purpose of using the truck driven by plaintiff as a brake for the other truck does not charge an intent to injure plaintiff.")

6 Although *Perry* is hailed as the first case finding an employer liable for deliberate intention exception to cause injury, the court affirmed the judgment against Beverage, individually, but reversed the jury verdict against the employer because Perry had failed to show what he would have received under workers' compensation.

7 Grant v. Hass, 31 Tex. Civ. App. 688, 75 S.W. 342, 344.

8 The Michigan State Legislature modified the holding in Beauchamp in 1987, enacting Mich. Stat. Ann. § 17.237(131) (Callaghan 1988), M.C.L. §418.131(1), which reads in relevant part:

> The right to recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court.

9 Preparing Memorandum, Birklid v. Boeing, Washington State Supreme Court, p. 9 (1995).

10 The Michigan appellate court consolidated Golec v. Metal Exchange Corp., 208 Mich. App. 380, 384 (1995) with Travis for consideration on appeal. The juxtaposition of fact patterns is particularly valuable.

The Board's Work

by Judith Berrett

The final board meeting of Bar Year 1999-2000 took place in Spokane on September 13 in conjunction with Celebration 2000. The board effectively and efficiently moved through a very full agenda in an effort to complete the many issues that marked the year. It was the last board meeting for President **Dick Eymann** and Governors **Walt Krueger**, **Dick Manning** and **John Powers**. Two items, completion of work on the definition of the practice of law and confirmation of the appointment of a new *Bar News* editor, were acted upon in a conference call on October 6.

New Governor

Six exceptionally well-qualified candidates for the position of sixth-district governor appeared before the board. (The position had been made vacant with the election of Dale Carlisle as president-elect.) The governors' job was not to be envied, as each candidate had outstanding credentials and was extremely impressive. Congratulations to **S. Brooke Taylor** of Port Angeles, who was elected new governor (see page 56).

Diversity Position on the Board

Governor **Jim Deno** led the board through a thought-provoking discussion about adding a position of diversity to the board. This issue has been under consideration for nearly a year, and several groups, including the minority bar associations and the Committee for Diversity, have weighed in in favor of a new position. Governor Deno began by telling the board that he was asking them "to make a very difficult decision – to change our form of governance." He remarked that the Board of Governors is very concerned about diversity and ensuring that the Association's governance include and represent all members.

Seattle attorney **Lem Howell**, member of the Board of Governors from 1989-1992, and the only person of color ever to have served on the board, spoke persuasively and movingly about the need for representation. "A need is perceived, and if you perceive there is a need, you must do something." He stated that "there will be more sensitivity" with a minority board member. He concluded by asking: "What harm can it do?"

Mark Shepherd, representing the King County Bar Association, relayed that the KCBA had discussed this issue at length and felt that it was the right thing for the WSBA to do — to "move forward with inclusiveness." **Jim Macpherson**, of the Washington Defense Trial Lawyers, said: "The issue is representation. We must think of ways to get diverse voices here."

Former WSBA President **Wayne Blair** also spoke powerfully in favor of the proposal. "We need to make a change. It may be controversial, but the time has come." **Scott Smith**, of the Access to Justice Board, voiced his opinion that it was "an easy way to make a step in the right direction."

Committee for Diversity Co-chair **Bonnie Terada** told how, through numerous discussions, the committee struggled with the proposal. The committee initially thought it "smacked of tokenism," but later changed its position.

All governors spoke sincerely and thoughtfully, some recounting their own personal struggles over this issue. Governor **Vicky Vreeland** told how her first reaction was that it amounted to tokenism, and she wondered about representation for all minorities, not just racial minorities; she concluded that it should be a racial minority seat. She stated that the board needs the "perspective and sensitivity" a racial minority would bring.

Governor **Daryl Graves** said he was "pleased and proud" the board took the time and energy to consider the issue in such depth, concluding by stating: "I'm convinced this is the right thing to do." Governor **Jenny Durkan**, participating via phone from London, also voiced her strong support. Governor **Dick Manning** observed: "There's no right or wrong answer to this very, very difficult issue." He further stated that he didn't think the problem would be answered by a new position. "We need to reach out and spend time with people who have interest in leadership and help them get elected."

Governor **Walt Krueger** characterized this topic as "probably the most difficult issue the board has dealt with in the past three years." He said: "We are all in favor of increasing the diversity … but it would