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EXCEPTION TO THE RULE: RELAXING THE STANDARD FOR INTENTIONAL TORTS UNDER THE INDUSTRIAL INSURANCE ACT

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Abstract: In *Walston v. Boeing*, the Supreme Court of Washington upheld a standard used to determine whether a worker injured by his employer's deliberate intent to expose him to toxic materials could pursue remedies outside of the state's workers' compensation system. The *Birklid* standard—which requires claimants seeking remedies under the "deliberate intention" exception to show that an employer willfully disregarded actual knowledge that an injury was certain to occur—effectively prevents toxic exposure claimants from surviving motions for summary judgment. This result runs in strict contravention of the Legislature's purpose in enacting both the deliberate intention exception and the Industrial Insurance Act. Workers who contract diseases as a result of being exposed to toxic substances by the deliberate intent of employers should be afforded the same remedial relief offered to workers injured by more immediately-felt intentional acts. To accomplish this, the Supreme Court of Washington should reconsider the high burden it places on claimants seeking remedies under the deliberate intention exception. By altering the *Birklid* standard to allow for a lower degree of certainty that an employer's actions will result in injury, Washington courts can help ensure that any injury produced by the deliberate intent of an employer is fairly compensated.

INTRODUCTION

Gary Walston began working at The Boeing Company (Boeing) as a hammer shop employee in 1956.[1] Over the course of his thirty-eight year career, Walston worked with and around asbestos-containing products on numerous occasions.[2] In 1985, Boeing directed maintenance workers to repair pipe insulation located above the hammer shop where Walston worked.[3] Because the pipe insulation contained asbestos fibers, the maintenance workers wore protective clothing known as "moon suits" and used ventilators for breathing.[4] Soon after repairs began, Walston and other workers in the hammer shop noticed visible dust and debris falling from the overhead work.[5] Concerned for their health, the hammer shop

1. Walston v. Boeing Co., 181 Wash. 2d 391, 394, 334 P.3d 519, 520 (2014).
2. *Id.* at 391, 334 P.3d at 520–21.
3. *Id.* at 391, 334 P.3d at 520.
4. *Id.*
5. *See id.*

employees asked the shop supervisor to allow them to perform their work in another location, away from the falling debris.[6] The supervisor denied their request, suggesting they work in areas not directly beneath the overhead repairs.[7] Walston and the others worked in the hammer shop without protective clothing or ventilators for close to a month.[8]

In 2010, Walston was diagnosed with mesothelioma,[9] a rare form of cancer generally associated with exposure to airborne asbestos particles.[10] Walston sued Boeing under the deliberate intention exception[11] of Washington's Industrial Insurance Act, claiming that Boeing had intentionally exposed him and the other hammer shop workers to a substance it knew to be dangerous.[12] The exception, if applicable, would allow Walston to pursue common law tort remedies against his employer in addition to existing workers' compensation claims.[13] Boeing moved for summary judgment, arguing that Walston was limited to recovery under the Industrial Insurance Act because the company did not have actual knowledge that Walston was certain to be injured by the exposure to asbestos.[14] The trial court denied Boeing's motion.[15] The court of appeals reversed and remanded, holding that Walston had failed to raise a material question of fact as to whether Boeing had "actual knowledge" that the falling asbestos was certain to cause his injury.[16]

In July of 2013—three months after Walston had died of his illness[17]—the Supreme Court of Washington granted review of the lower court's decision.[18] In a 5–4 split, the Supreme Court of Washington affirmed.[19] In its opinion, the majority relied on *Birklid v. Boeing Co.*,[20] a prior decision addressing the deliberate intention exception in instances of toxic

6. *See id.*

7. *Id.*

8. *Id.* at 409, 334 P.3d at 528 (Wiggins, J., dissenting).

9. *Id.* at 394, 334 P.3d at 520.

10. *Malignant Mesothelioma–Patient Version*, NAT'L CANCER INST., http://www.cancer.gov/cancertopics/types/mesothelioma [https://perma.cc/2FPC-HTZQ].

11. WASH. REV. CODE § 51.24.020 (2015).

12. *Walston*, 181 Wash. 2d at 395, 334 P.3d at 521.

13. § 51.24.020.

14. *Walston*, 181 Wash. 2d at 395, 334 P.3d at 521.

15. *Id.*

16. Walston v. Boeing Co., 173 Wash. App. 271, 288, 294 P.3d 759, 768 (2013).

17. *Walston*, 181 Wash. 2d at 394, 334 P.3d at 520–21.

18. Walston v. Boeing Co., 177 Wash. 2d 1019, 304 P.3d 115 (2013) (granting review).

19. *Walston*, 181 Wash. 2d at 393, 334 P.3d at 519.

20. 127 Wash. 2d 853, 904 P.2d 278 (1995).

exposure. In that case, the Supreme Court of Washington determined that the deliberate intention exception is triggered when "the employer had *actual knowledge* that an injury was *certain to occur* and willfully disregarded that knowledge."[21] Applying the *Birklid* test to Walston's case, the Supreme Court of Washington held that exposing an employee to a risk of disease was not sufficient to meet the deliberate intention exception.[22] Because Walston could not show that Boeing knew with certainty that exposing workers in the hammer shop to a month-long deluge of asbestos fibers would result in his disease, the Court held that Boeing's motion for summary judgment was improperly denied.[23]

This Comment argues that the *Birklid* standard creates an unjust windfall for employers who intentionally expose their workers to dangerous toxins in the workplace. Because toxic exposure diseases present issues that are distinguishable from more traditional injuries contemplated by the workers' compensation system, the Supreme Court of Washington should rework the standard to ensure that all employees injured by the deliberate acts of their employers, regardless of the type of compensable injury, are fairly compensated in light of the purpose of modern workers' compensation law. Part I of this Comment will address the history and purpose of Washington's workers' compensation statute, the Industrial Insurance Act, including a more detailed summary of the deliberate intention exception. Part II will provide a summary of the rationale the *Birklid* Court used in fashioning the deliberate intention standard. Part III will describe the problems inherent in the *Birklid* standard as applied to cases of deliberate toxic exposures that result in diseases. Part IV will argue that the Supreme Court of Washington should relax the *Birklid* standard in order to better account for toxic exposures and the diseases they produce.

I. WORKERS' COMPENSATION

The development of workers' compensation in the United States largely begins with the second Industrial Revolution. Taking advantage of the unprecedented expansion of transportation and communications infrastructure throughout the country during the mid-nineteenth century, businesses and entrepreneurs looked to distribute ever-increasing volumes of goods into the hands of previously unreachable consumers.[24] The

21. *Id.* at 865, 904 P.2d at 285 (emphasis added).

22. *Walston*, 181 Wash. 2d at 397, 334 P.3d at 522.

23. *Id.*

24. JAMES S. OLSON & SHANNON L. KENNY, THE INDUSTRIAL REVOLUTION: KEY THEMES AND

burgeoning of a truly national marketplace created a need for new and more efficient methods of production.[25] The Bessemer process paved the way for the cheap fabrication of steel; sewing and Bonsack machines reinvigorated the textile and tobacco industries, respectively.[26] New chemical processes increased the availability of aluminum, reduced the price of fertilizer, and lowered the cost of sugar production.[27] Along with the development and implementation of mass production techniques, technological improvements across the gamut of industries allowed capitalists to take advantage of the new national economy.[28]

But these advances were not without cost. Industrializing economies across the globe experienced a surge of accident rates as new industries and more powerful machinery were developed.[29] America was no exception, as the percentage of deaths attributable to accidents among men in America rose from 7 percent in 1850 to 12 percent in 1880, a 70 percent increase.[30] Nearly one-third of these accidents occurred in the workplace,[31] where human laborers contended and toiled with compassionless metal counterparts.[32] Industrialization had brought with it an "army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter."[33] With carnage on the rise and showing no signs of slowing, the participants of industry struggled to find an agreeable remedy for those that bore the costs.

DOCUMENTS 67 (2015).

25. *Id.*

26. Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FIN. 831, 834–35 (1993).

27. *Id.*

28. *See* OLSON & KENNY, *supra* note 24, at 126.

29. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 22 (2004).

30. *Id.* at 26.

31. *See id.* at 27 ("Indeed, accidents were the leading cause of death among workers in hazardous industries as diverse as railroads, mining, metal work, rubber work, shipping and canals, quarries, telegraph and telephones, electric lighting, brick- and tile-making, and terra cotta work. In 1890, railroad worker death rates were 314 per 100,000 per year. In that same year, coal miner fatality rates were comparable, ranging from 215 deaths per 100,000 workers per year in bituminous coal mines to 300 deaths per 100,000 workers per year in anthracite coal mines. . . . Moreover, American wage earners were highly concentrated in some of the most dangerous trades; in 1890, railroad and mine workers alone represented more than one in twenty American wage earners.").

32. *See id.* ("In Massachusetts, for example, 63 percent of injuries in textile factories were caused by elevators or moving machinery. . . . Women factory operatives were also subject to the risk of horrific injuries to their scalps by having their hair caught in power-operated shafts.").

33. Borgnis v. Falk Co., 133 N.W. 209, 215 (Wis. 1911).

A. The Inadequacies of the Common Law

Prior to the no-fault system of workers' compensation, workers injured on the job were limited to pursuing claims against their employers via the common law tort system.[34] Generally, this required proof of employer negligence as the cause of an employee's on-the-job injuries.[35] This system presented a number of significant obstacles for injured claimants. The first of these was that injured workers often struggled to find testimonial support from among their ranks, as many employees were reluctant to testify on behalf of an injured colleague for fear of retaliatory actions by the employer.[36] Second, workers displaced by their injuries encountered tremendous financial pressures to quickly settle claims against their employers in order to avoid becoming destitute.[37] Understandably, the weight of those external pressures increased where the injured employee served as the principal breadwinner of a family unit.[38] Third, employers were often able to succeed against employee-initiated suits by claiming any of a number of common defenses.[39] Fourth, exorbitant court costs, delays, and contingency fees significantly reduced the amount of a plaintiff's actual compensation.[40] The ultimate result was a faulty compensatory system that "[gave] a stone to one who asks for bread."[41]

B. The Great Compromise

In response to the pitfalls of the common law tort system—as well as the uncertainty employers faced when state courts began to check employers' use of common law defenses to negligence in the beginning

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34. George H. Singer, *Workers' Compensation: The Assault on the Shield of Immunity—Coming to Blows with the Exclusive-Remedy Provisions of the North Dakota Workers' Compensation Act*, 70 N.D. L. REV. 905, 907–08 (1994).

35. *Id.* at 908–09.

36. *Id.* at 909.

37. *Id.*

38. *See id.*

39. Darin Calbreath Davidson, Comment, *Expansion of the 'Deliberate Intention' Exception to Washington's Workers' Compensation Exclusivity: Following* Birklid v. Boeing Co.*, When Does an Employer Intend Employee Injury?*, 32 GONZ. L. REV. 225, 228 (1996) ("In order to receive compensation for workplace injuries, employees had to overcome the 'unholy trinity' of contributory negligence, assumption of the risk, and the 'fellow servant' rule. Employers could generally escape liability by employing one or more of these defenses.").

40. Singer, *supra* note 34, at 909.

41. Borgnis v. Falk Co., 133 N.W. 209, 215 (Wis. 1911).

of the twentieth century[42]—the Washington State Legislature enacted the Industrial Insurance Act (IIA) in 1911. Functionally, the IIA instituted two important changes. First, most civil actions by employees hurt on the job were eliminated and replaced by an administrative proceeding.[43] Second, fault would no longer be considered in determining liability for injuries in the workplace.[44] The first of these changes benefited employers by eliminating the uncertainties that accompanied civil defense of injury and death claims before sympathetic juries.[45] The second change benefited workers by eliminating the legal hurdles inherent in the common law approach, thus providing quicker and surer relief in the wake of workplace injuries.[46] The "quid pro quo" nature of this arrangement between workers and employers, each giving up something in exchange for something else, led to its lofty designation as the "great compromise."[47]

Although the Act provided benefits to both employees and employers, its language prioritizes remedial relief for the injured worker:

> The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of the wage worker.[48]
>
> The legislature finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers.[49]

Over the years, Washington courts have continuously recognized this

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42. *See, e.g.*, Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305 (1998); Green v. W. Am. Co., 30 Wash. 87, 70 P. 310 (1902) (narrowing the assumption-of-risk defense).

43. WASH. REV. CODE § 51.04.010 (2015).

44. *Id.*

45. *See* Davidson, *supra* note 39, at 229.

46. § 51.04.010.

47. Stertz v. Indus. Ins. Comm'n of Washington, 91 Wash. 588, 590, 158 P. 256, 258 (1916).

48. § 51.04.010.

49. WASH. REV. CODE § 51.04.062 (2015).

central purpose.[50]

C. The Deliberate Intention Exception

A crucial aspect of the IIA—and of any workers' compensation system—is the exclusivity provision, which precludes the availability of state tort claims against employers for compensable on-the-job injuries.[51] But this prohibition is not absolute. A worker with injuries resulting from the "deliberate intention" of his or her employer has a cause of action outside the IIA's limited compensation provisions:

> If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of 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.[52]

The purpose of enacting this provision was two-fold. First, the provision was meant to deter the intentional wrongdoings of employers against employees.[53] Second, the provision was designed to ensure that employers did not bear the risks associated with the intentional wrongdoings of other employers.[54] As a general matter, the "non-accidental" nature of intentional-tort injuries committed by employers against employees made their occurrences discordant with the "accidental" roots of modern workers' compensation systems.[55]At the center of the exclusivity provision—and at issue in the *Walston* case—is the meaning of the phrase "deliberate intention."

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50. *See, e.g.*, Dennis v. Dep't of Labor & Indus., 109 Wash. 2d 467, 470, 745 P.2d 1295, 1297 (1987) ("[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."); Favor v. Dep't of Labor & Indus., 53 Wash. 2d 698, 703, 336 P.2d 382, 385 (1959) ("[Workers' compensation] was intended to provide, at the expense of the industry employing them, a sure and speedy relief for workmen (or their dependents) where disability or death resulted from injuries sustained in the course of their employment . . . ."); Montoya v. Greenway Aluminum Co., Inc., 10 Wash. App. 630, 634, 519 P.2d 22, 25 (1974) ("The Industrial Insurance Act is intended to grant the employee a sure and certain relief while imposing liability upon the accident found regardless of the fault or due care of either the employer or the employee.").

51. WASH. REV. CODE § 51.04.010; *see also* Sharpe v. Am. Tel. & Tel. Co., 66 F.3d 1045, 1051 (9th Cir. 1995).

52. WASH. REV. CODE § 51.24.020 (2015).

53. Birklid v. Boeing Co., 127 Wash. 2d 853, 873, 904 P.2d 278, 289 (1995).

54. *Id.*

55. Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1650–51 (1983).

II. THE *BIRKLID* STANDARD

The ultimate test for determining whether a claimant satisfies the deliberate intention exception was fashioned in *Birklid v. Boeing Co*.[56] In that case, Boeing had begun to use a new material in certain interior parts of its airplanes in response to heightened Federal Aviation Administration regulations on flammability.[57] The material consisted of woven fiberglass cloth infused with phenol-formaldehyde resin.[58] As preproduction testing began, one of Boeing's general supervisors noted that the noxious odors of the material caused employees to complain of "dizziness, dryness in nose and throat, burning eyes, and upset stomach."[59] Anticipating that these symptoms would increase with greater production and higher temperatures, the supervisor requested improved ventilation in the facility.[60] Boeing management denied the request, citing economic considerations.[61] Predictably, workers experienced the previously complained-of symptoms once full production began.[62]

On certification from the U.S. Court of Appeals for the Ninth Circuit, the Supreme Court of Washington was tasked with identifying the standard for deliberate intention under the IIA.[63] The Court began by noting that the following policies inherent in the exception should be given effect: 1) remedies for employees deliberately injured by employers should not be limited to the IIA; and 2) employers engaged in such conduct should not be allowed to burden and compromise the industrial insurance risk pool.[64] Rejecting Boeing's proposed interpretation of RCW 51.24.020, the Court provided a summary of how courts in Washington and elsewhere had dealt with the deliberate intention exception up to that point.

A. Deliberate Intention in Washington

The *Birklid* Court began its discussion of Washington's treatment of the deliberate intention exception with *Delthony v. Standard Furniture*

56. 127 Wash. 2d 853, 904 P.2d 278 (1995).
57. *Id.* at 856, 904 P.2d at 281.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 858–59, 904 P.2d at 282.
64. *Id.* at 859, 904 P.2d at 282–83.

Co.,[65] a 1922 dispute involving an exploding boiler. In that case, the plaintiff-worker sought compensation beyond what he had already received under the IIA "on the ground that the employer deliberately intended to injure him by allowing a dangerous condition to exist."[66] The *Delthony* court rejected the claim, reasoning that negligence on the part of the employer did not tend to prove deliberate intent.[67]

Subsequent Washington cases reinforced the *Delthony* requirement for specific intent. In *Higley v. Weyerhaeuser Co.*,[68] a worker sued his employer after he was injured while operating a saw with a Plexiglass protective shield.[69] Higley claimed that the employer's use of flimsy Plexiglass shields as a protective measure against the frequent breaking and flying of cutterheads was so negligent that it should be considered an intentional act.[70] The court rejected this argument, holding that a substantial certainty that an act would produce injury was insufficient to show deliberate intention.[71]

Foster v. Allsop Automatic, Inc.[72] further defined the parameters of the intent required. In that case, Foster's supervisors had allowed workers to disable the safety device on a 90-ton hydraulic punch press.[73] Foster was injured when the press struck one of his hands as he operated it—an occurrence that would have been impossible had the safety device been engaged.[74] Foster claimed that the circumvention of the safety device and the resulting injury to his hand were brought about by the deliberate intent of his employer.[75] Though the Court conceded that the employer may have intended that its workers operate a dangerous machine without a safety device, the Court concluded that the required intention under the deliberate intention exception "relates to the injury, not the act causing the injury."[76]

Prior to the *Birklid* decision, only one case contesting the existence of

65. 119 Wash. 298, 205 P. 379 (1922).
66. *Birklid*, 127 Wash. 2d at 859, 904 P.2d at 283.
67. *Delthony*, 119 Wash. at 300, 205 P. at 379–80.
68. 13 Wash. App. 269, 534 P.2d 596 (1975).
69. *Higley*, 13 Wash. App. at 270, 534 P.2d at 596.
70. *Id.*
71. *Id.* at 270–71, 534 P.2d at 596–97.
72. 86 Wash. 2d 579, 547 P.2d 856 (1976).
73. *Id*. at 580, 547 P.2d at 857.
74. *Id.*
75. *Id.* at 581, 547 P.2d at 857.
76. *Id.* at 584, 547 P.2d at 859.

deliberate intention sided with the plaintiff-worker.[77] Events giving rise to the injury in *Perry v. Beverage*[78] began when Beverage, the foreman of a logging camp, got into an argument with a buck sawyer named Perry.[79] As the argument escalated, Beverage swung a ceramic pitcher and struck Perry in the face, causing significant damage.[80] Perry sued Beverage for compensation outside the industrial insurance fund.[81] The Court ultimately affirmed the judgment against the foreman, concluding "the jury had a right to find that there was a deliberate intention on the part of Beverage to do injury."[82]

Following its summary of the law, the *Birklid* Court opined that prior jurisprudence had read the exception to the exclusivity provision of the IIA "nearly out of existence."[83] The Court reasoned that the legislature could not have intended the perimeters of the exception to begin and end with assault and battery by the employer on the employee, as was the case in *Perry*.[84] Although the *Perry* assault had been the only successfully contested case involving the exception, the statutory words of RCW 51.24.020 must provide for "something more."[85] Taking advantage of the case before it, the *Birklid* Court set out to more clearly define the meaning of the statute.[86]

B. Deliberate Intention Elsewhere

In fashioning a new test for the deliberate intention exception, the *Birklid* Court considered how other jurisdictions had approached the subject. It first looked at the "substantial certainty" test adopted by a number of states.[87] Michigan had adopted the standard nearly ten years prior in *Beauchamp v. Dow Chemical Co*.[88] In that case, a research chemist at Dow Chemical was injured after being exposed to Agent

77. Birklid v. Boeing Co., 127 Wash. 2d 853, 861, 904 P.2d 278, 283 (1995).
78. 121 Wash. 652, 209 P. 1102 (1922).
79. *Id.* at 654–55, 904 P. at 1103.
80. *Id.*
81. *Id.* at 659, 904 P.2d at 1105.
82. *Id.*
83. Birklid v. Boeing Co., 127 Wash. 2d 853, 862, 904 P.2d 278, 284 (1995).
84. *Id.* at 862–63, 904 P.2d at 284.
85. *Id.* at 863, 904 P.2d at 284.
86. *Id.*
87. *Id.* at 864, 904 P.2d at 284–85.
88. 398 N.W.2d 882 (Mich. 1986).

Orange,[89] a compound containing the toxic substance dioxin.[90] Beauchamp claimed that Dow Chemical had intentionally assaulted him by exposing him to a chemical they knew to be dangerous.[91] Recognizing that the legislative intent of the state's workers' compensation system was to provide an alternative means of compensating *accidental* injuries,[92] the *Beauchamp* Court concluded that Michigan's workers' compensation statute did not prevent workers from bringing intentional tort claims against employers.[93] But in order to address the injured chemist's claims, the appropriate definition of "intentional" would need to be determined.[94]

The *Beauchamp* Court considered the pros and cons of two definitions of "intentional" that were prevalent at the time: the true intentional tort standard and the substantial certainty test.[95] The true intentional tort standard limited recovery to instances where the employer "truly intended the injury as well as the act."[96] This was the standard the Michigan Court of Appeals had applied to Beauchamp's claims at the lower level.[97] The Supreme Court of Michigan expressed a number of reservations with the true intentional tort test, including the fear that it might allow employers "to injure and even kill employees and suffer only workers' compensation damages so long as the employer did not specifically intend to hurt the worker."[98] Furthermore, the Court recognized that a lack of remedial compensation for the intentionally injured worker would create perverse incentives for employers primarily concerned with the bottom line.[99] If the costs of accidental injury were to be borne by industrial members of

89. *Id.* at 883.

90. *See* Nehmer v. Veterans' Admin. of the Gov't of the U.S., 284 F.3d 1158, 1160 (9th Cir. 2002) ("Agent Orange is a chemical defoliant used by the United States Armed Forces in Vietnam to clear dense jungle land during the war. It contains the toxic substance dioxin. Since its use, Agent Orange has been statistically linked with the occurrence of many diseases in those exposed, including prostate cancer.").

91. *Beauchamp*, 398 N.W.2d at 833.

92. *Id.* at 887.

93. *Id.* at 889.

94. *Id.* at 891.

95. *Id*. at 887–93.

96. *Id*. at 891.

97. *Id.* at 891.

98. *Id.* at 893.

99. *Id.* (quoting Blankenship v. Cincinnati Milacron Chem., 433 N.E.2d 572, 579 (Ohio 1982) (Celebrezze, J., concurring) ("The bottom line in this case is that prohibiting an employee from suing his or her employer for intentional tortious injury would allow a corporation to 'cost-out' an investment decision to kill workers. This abdication of employer responsibility . . . is an affront to the dignity of every single working man and working woman in Ohio.")).

the workers' compensation system,[100] the true intentional tort standard could allow an employer wishing to intentionally injure his workers "to shift his liability to a fund paid for with premiums collected from innocent employers."[101]

The *Beauchamp* Court then considered the substantial certainty test as a means of defining the exclusivity provision.[102] Under that test, intentional torts are not "limited to consequences which are desired. 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."[103] Although it ultimately adopted this standard,[104] the *Beauchamp* Court recognized that the concepts of substantial certainty and substantial risk could be a source of confusion.[105] Courts could, and frequently did,[106] blur the lines that separated intentional, reckless, and negligent conduct.[107] In order to avoid misapplication of the standard, the Court gave examples of instances where employer conduct implicated a substantial certainty of injury.[108] On balance, the *Beauchamp* Court concluded that the benefits and protections offered by a properly applied substantial certainty test outweighed the clearer definition of "intentional" provided by the true intentional tort standard.[109]

In addition to the standards discussed by the *Beauchamp* Court, the *Birklid* Court briefly considered Oregon's approach to defining

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100. Mackin v. Detroit-Timkin Axle Co., 153 N.W. 49, 51–52 (Mich. 1915).

101. *Beauchamp*, 398 N.W.2d at 889 (quoting Collier v. Wagner Castings Co., 408 N.E.2d 198, 203 (Ill. 1980)).

102. *Id.* at 893.

103. Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981); *see also Beauchamp*, 398 N.W.2d at 892 ("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.").

104. *Beauchamp*, 398 N.W.2d at 893.

105. Bradfield v. Stop-N-Go Foods, Inc., 477 N.E.2d 621, 621–22 (Ohio 1985) (Holmes, J., dissenting).

106. *See, e.g.*, *id.*; Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1047 (Ohio 1984) (extending substantial certainty test to cover substantial likelihood of injury); Bradfield v. Stop-N-Go Foods, Inc., 477 N.E.2d 621, 621–22 (Ohio 1985) (Holmes, J., dissenting); Nayman v. Kilbane, 439 N.E.2d 888, 890–91 (Ohio 1982) (Holmes, J., dissenting).

107. *Beauchamp*, 398 N.W.2d at 893.

108. *Id.* at 23–25 (quoting Serna v. Statewide Contractors, 429 P.2d 504, 505–06 (Ariz. Ct. App. 1967)) ("Two men were killed when a ditch caved in and buried them alive. In the five months preceding the disaster, inspectors had warned that 'the sides of the ditch were not sloped properly, the side was sandy, more shoring was needed, and escape ladders should be placed every 25 feet.' During that time a cave-in had occurred, burying one of the decedents up to his waist. All warnings were ignored.").

109. *See Beauchamp*, 398 N.W.2d at 893.

"deliberate intent."[110] In *Lusk v. Monaco Motor Homes, Inc.*,[111] a painter sued his employer for failing to provide a supplied-air respirator in poorly ventilated painting booths.[112] Many of the paints the employer used on its products contained isocyanates,[113] compounds with various negative health effects.[114] After experiencing headaches, dizziness, memory loss, and nausea, the painter asked his employer to supply the required respirator.[115] The employer did not bring in a supplied-air system until some months later, and only then for a limited time because he did not wish to buy the unit.[116] The plaintiff's condition continued to worsen until his physician advised him to quit.[117] By the time he left his job, the painter had become so sensitive to hydrocarbons that he was permanently disabled from working as a painter.[118]

The *Lusk* Court's approach to defining the meaning of "deliberate intent" was more nuanced than that of the *Beauchamp* Court. Like Washington's treatment of intent in *Foster*, the Court found that deliberate intent refers to specific intent to cause an injury.[119] The Court went on to stipulate, however, that the intent to cause injury must apply "to someone, although not necessarily to the particular employe[e] that was injured."[120] The Court seemed to add another wrinkle to the deliberate intention exception by giving meaning to the term "deliberate."[121] In addition to showing that an employer had "intent to injure," the standard required a showing that the employer "had an opportunity to weigh the consequences and to make a conscious choice among possible courses of action."[122]

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110. Birklid v. Boeing Co., 127 Wash. 2d 853, 865, 904 P.2d 278, 285 (1995).

111. 775 P.2d 891 (Or. 1989).

112. *Id.* at 892.

113. *Id.*

114. *See Safety and Health Topics: Isocyanates*, OSHA, https://www.osha.gov/SLTC/isocyanates/ [https://perma.cc/Q23Z-8J3U] ("Health effects of isocyanate exposure include irritation of skin and mucous membranes, chest tightness, and difficult breathing. Isocyanates include compounds classified as potential human carcinogens and known to cause cancer in animals. The main effects of hazardous exposures are occupational asthma and other lung problems, as well as irritation of the eyes, nose, throat, and skin.").

115. *Lusk*, 775 P.2d at 892.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 894.

120. *Id.*

121. *Id.*

122. *Id.*

C. The Decision

Ultimately, the *Birklid* Court rejected both the substantial certainty test adopted by Michigan in *Beauchamp* and Oregon's conscious weighing test.[123] The Court reasoned that Washington's historically narrow interpretation of the exclusivity provision—especially its outright rejection of the substantial certainty test in *Higley*—required as much.[124] Furthermore, the Court was hesitant to undo what it perceived to be the generational work of preserving the "grand compromise" embodied in the IIA.[125] Instead, the Court fashioned its own definition, holding that deliberate intention "means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."[126] Because Boeing "knew in advance its workers would become ill from the phenol-formaldehyde fumes, yet put the new resin into production" and "observed its workers becoming ill from the exposure," a trier of fact could find deliberate intention.[127]

Unfortunately, the facts in *Birklid* are distinguishable from facts one might generally expect in an intentional toxic exposure claim. The plaintiffs in *Birklid* had the "advantage" of suffering from symptoms immediately upon being exposed to the harmful substance.[128] Would the result have been the same had the plaintiffs, some years after being exposed to the chemicals and never having shown immediate symptoms of toxic exposure, brought a claim under the deliberate intention exception? *Walston* clearly answers that question in the negative.[129]

III. THE *BIRKLID* WINDFALL

The application of the *Birklid* standard to cases like Gary Walston's—where an employee claims that a disease was the result of intentional exposure to toxic substances by his employer—undermines the purpose of the deliberate intention exception by making it nearly impossible for claimants like Walston to obtain just relief for their injuries. This, by extension, undermines the IIA. Notwithstanding Washington courts' consistent treatment of the exception as a "narrowly interpreted"

123. Birklid v. Boeing Co., 127 Wash. 2d 853, 865, 904 P.2d 278, 285 (1995).

124. *Id.* at 865–66, 904 P.2d at 285.

125. *Id*. at 859, 873–74, 904 P.2d at 282, 289–90.

126. *Id.* at 865, 904 P.2d at 285.

127. *Id.* at 863–65, 904 P. 2d at 284–85.

128. *Id.* at 856, 904 P.2d at 281.

129. Walston v. Boeing Co., 181 Wash. 2d 391, 334 P.3d 519 (2014).

provision,[130] the *Birklid* standard provides a windfall for employers that deliberately expose workers to chemicals and substances they know to be harmful. To better understand the trouble Washington courts have had in constructing an equitable approach to the deliberate intention exception, it is helpful to examine the IIA's legislative framework.

A. Injury and Disease: Unique Concepts with a (Supposedly) Common Remedy

Injuries have always been at the center of workers' compensation systems.[131] The IIA—like workers' compensation statutes in other states—sought to address the ascending rate of traumatic, physical injuries in the workplace as industrialization swept America.[132] The Legislature's conceptualization of "injury" at the time of the IIA's ratification is apparent from the definition it supplied for that term in Title 51: "'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom."[133] This definition is consistent with the "traditional" injuries one might expect to be endured by workers in the latter half of the nineteenth century—broken bones, amputations, burns or paralysis caused by interactions with machinery, proximity to industrial explosions, or burial in a collapsed coal mine.[134]

The IIA's original iteration did not include compensatory coverage for diseases incurred in the workplace—the addition of occupational diseases to the workers' compensation scheme did not occur until 1937.[135] If this fact alone were not enough to establish the vast difference between "injury" and "disease" contemplated by the IIA, the Supreme Court of Washington clarified the point shortly after occupational diseases were added to the state's workers' compensation system:

> It will be noted that the legislature in the original act used the word "injury" and defined it, while in the occupational disease act it used the word "disability" but gave it no definition. It is obvious from the proceedings of the legislature that in passing the last act

130. *See, e.g.*, Howland v. Grout, 123 Wash. App. 6, 10, 94 P.3d 332, 334 (2004); Byrd v. Sys. Transp., Inc., 124 Wash. App. 196, 202, 99 P.3d 394, 397 (2004).

131. *See supra* Part I.

132. *See id.*

133. WASH. REV. CODE § 51.08.100 (1961).

134. *See supra* Part I.

135. Dennis v. Dep't of Labor & Indus., 109 Wash. 2d 467, 472–73, 745 P.2d 1295, 1298–99 (1987).

> it had in mind that a different ruling should apply to those suffering from occupational disease when the word disability was used, otherwise the word injury, already defined, would have been employed. . . . The difference between the meaning of the words is more apparent when we consider the distinct difference between traumatic injury and occupational disease. The former is one of notoriety, a happening which can be fixed at a point in time, while the latter . . . has a slow and insidious approach and in many cases does not manifest itself until after the lapse of a considerable length of time.[136]

Although the addition of occupational diseases in 1937 created harmony in the IIA's treatment of compensable injuries for employees that suffered from legitimate accidents or illnesses,[137] the convergence of triggering words has had detrimental effects in cases where workers allege that their injuries were the result of an employer's deliberate intent. The interplay of terms found in the IIA's boilerplate definition of "injury," the deliberate intention exception provision, and the supplemental definitions provided in Chapter 24 of the IIA create a statutory dissonance that ultimately undermines the integrity of the intentional tort exception.

The inherent immediacy of "injury"—as defined in Chapter 8 of the IIA—conflicts with the slow development of many diseases referred to by the Supreme Court of Washington in *Henson*.[138] Nowhere is this more troubling than in the application of the deliberate intention exception. Chapter 24 of the IIA contains both the deliberate intention exception and a supplemental definition of "injury" to be applied to the exception. Side by side, the provisions read as follows:

> If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of 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.[139]
>
> For the purposes of this chapter, "injury" shall include any physical or mental condition, *disease*, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.[140]

Thus, in instances where the alleged intentional tort has resulted in a

136. Henson v. Dep't of Labor & Indus., 15 Wash. 2d 384, 390–91, 130 P.2d 885, 887–88 (1942).

137. *Dennis*, 109 Wash. 2d at 472–74, 745 P.2d at 1298–99.

138. WASH. REV. CODE § 51.08.110 (2015); *Henson*, 15 Wash. 2d at 390–91, 130 P.2d at 888.

139. WASH. REV. CODE § 51.24.020 (2015).

140. *Id.* at § 51.24.030(3) (1995) (emphasis added).

disease, the construction of RCW 51.24.020 would read like this:

> If [a disease] results to a worker from the deliberate intention of his or her employer to produce such [disease], the worker or beneficiary of 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.

One problem with this construction is that it doesn't account for the unique place occupied by toxic exposure injuries in the landscape of tort litigation. American courts have been struggling with problems of causation in toxic torts since the 1970s.[141] Today, the general consensus among jurisdictions is that plaintiffs must prove general causation (a showing that the substance in question is capable of causing the injury at issue) and specific causation (proof by preponderance of the evidence that the particular substance caused the specific injury).[142] The burden of proving general causation can be alleviated somewhat in instances where the dangers of the substance in question are well documented, as is the case with asbestos.[143] But when the effects of a certain substance are less known, or when the substance itself is relatively new, courts must lean more heavily on epidemiological studies to determine whether the substance is in fact capable of causing injury.[144] These studies are not always conclusive and are sometimes based on weak evidentiary sources.[145]

Compared to the straightforward application of the causation element in "traditional" injury torts, toxic exposure torts present myriad issues that warrant a differential treatment under the deliberate intention exception. Justice Charles Wiggins, writing for the dissent in *Walston*, perhaps best summed up the problems associated with equating diseases with injuries for purposes of the exception:

> Diseases differ from traditional workplace injuries. For example, physical injuries are often immediately visible, while diseases have latency periods with symptoms materializing sometime after

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141. David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 51 (2008).

142. *Id.* at 52.

143. Walston v. Boeing Co., 181 Wash. 2d 391, 401, 334 P.3d 519, 524 (2014) (Wiggins, J., dissenting).

144. Bernstein, *supra* note 141, at 53.

145. *See id.* at 61–66 (explaining the problematic nature of relying on epidemiological reports based on "high-dose animal studies, anecdotal case reports, analogizing from known effects of 'similar' chemicals, preliminary epidemiological studies that have not been peer-reviewed, and differential etiologies used to 'rule in' an otherwise unknown causal relationship").

> exposure. Relatedly, there is no way to know with absolute certainty that an exposed individual will ever contract a disease. Moreover, most diseases are caused by multiple factors, which can make it difficult to prove causation. . . . Most toxic exposure injuries are dose-related, meaning the greater the exposure, the more severe the consequences. In addition, whether an exposed individual will suffer a compensable injury depends in part on vulnerabilities unique to that person. These qualities make it near impossible to predict with absolute certainty how each exposure will affect a particular individual.[146]

Given the complex nature of disease development in the human body as a result of toxic exposure, the threshold level of certainty required by the *Birklid* standard shifts the ill plaintiff's burden of proof into an unattainable realm. Although injuries and diseases are meant to have a common remedy under the law, current conditions do not allow for such a result.

B. Intent and Certainty: Straightforward Application for Injuries, Bar to Recovery for Diseases

The inclusion of the deliberate intention exception in the IIA is a clear indicator that accidents and intentional acts were meant to be treated differently. The exception ensures that intentional-tort-committing employers do not taint the risk pool of workers' compensation, but it is also meant to deter employers from intentionally placing their employees in harm's way.[147] If the Legislature intended to protect workers' compensation participants in this way, we must ask whether the *Birklid* standard, as applied to diseases caused by deliberate toxic exposure, gives effect to that intent.

The *Delthony*, *Higley*, and *Foster* line of cases narrowed the application of the exception to one of specific intent.[148] *Delthony* rejected the notion that employer negligence could tend to prove deliberate intent.[149] *Higley* held that substantial certainty that an act would produce an injury was insufficient to show deliberate intent.[150] *Foster* made it clear that intent, for purposes of the exception, related to the resulting injury,

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146. *Walston*, 181 Wash. 2d at 401, 334 P.2d at 524 (Wiggins, J., dissenting).

147. Birklid v. Boeing Co., 127 Wash. 2d 853, 873, 904 P.2d 278, 289 (1995).

148. *See supra* Part II.

149. Delthony v. Standard Furniture Co., 119 Wash. 298, 300, 205 P. 379, 379–80 (1922).

150. Higley v. Weyerhaeuser Co., 13 Wash. App. 269, 270–71, 534 P.2d 596, 598 (1975).

not to the act that caused the injury.[151] Together, these cases produced deliberate intent jurisprudence that the *Birklid* Court ultimately found unacceptable.[152] The exception, that Court found, was meant to apply to cases beyond the typical instance of assault and battery.[153] It was with this acknowledgement that the *Birklid* Court set out to find a standard that would provide injured workers "something more" than the state had, to that point, offered them.[154]

In defining the meaning of the statute, the *Birklid* Court found the facts of the case to be illuminating.[155] It focused on the requisite level of certainty an employer must have that his actions will result in an employee's injury.[156] What made the case distinguishable from previous deliberate intention cases was the fact that Boeing had already exposed its workers to the toxic substance, had seen the injurious effects it had on its workers, and knowingly exposed them to the substance again.[157] The second exposure was no accident.[158] Boeing's actions had involved the "willful disregard of actual knowledge" that employees would be injured.[159] Later in its opinion, the *Birklid* Court adopted this very same language as the new deliberate intention standard.[160]

In cases involving a simple battery event such as *Perry*, in which an employer physically assaulted his employee, the high level of certainty that the employer's actions would result in injury is fairly apparent.[161] Even in circumstances like those in *Birklid*, in which the employer knew that exposing employees to certain toxins would produce the same injurious result as it had in the testing phase, the high level of certainty is clear.[162] For cases like these, where the injury is immediately apparent and easily traceable to the actions of the employer, the *Birklid* standard offers a reasonable solution. But when the compensable injury is a disease that manifests after years of latency, removed from the easily traceable actions of the employer, the *Birklid* standard falls short.

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151. Foster v. Allsop Automatic, Inc., 86 Wash. 2d 579, 584, 547 P.2d 856, 859 (1976).
152. *Birklid*, 127 Wash. 2d at 862, 904 P.2d at 284.
153. *Id.* at 862–63, 904 P.2d at 284.
154. *Id.* at 863, 904 P.2d at 284.
155. *Id.* at 862, 904 P.2d at 284.
156. *Id.* at 863–866, 904 P.2d at 284–86.
157. *Id.* at 863, 904 P.2d at 284.
158. *Id.*
159. *Id.*
160. *Id.* at 865, 904 P.2d at 286.
161. Perry v. Beverage, 121 Wash. 652, 659, 209 P. 1102, 1105 (1922).
162. *Birklid*, 127 Wash. 2d at 863, 864–65, 904 P.2d at 284–86.

IV. FIXING THE SYSTEM

Current deliberate intention jurisprudence makes it nearly impossible for plaintiffs to prove that an employer had absolute certainty that a disease would result from its acts or omissions.[163] In general terms, accidents and occupational diseases are to be treated similarly under the IIA.[164] But the combination of the *Birklid* standard and the inherent differences between immediate injuries and latent diseases means that plaintiffs bringing claims under the deliberate intention exception will be treated differently depending on the nature of their injuries. Since worker-plaintiffs have little control over the nature of the injuries they sustain, the Supreme Court of Washington must relax the *Birklid* standard to better account for deliberate toxic exposures and the diseases they produce.

A. Relaxing the Standard: Bringing Diseases into the Realm of Injuries

The *Birklid* Court's interpretation of RCW 51.24.020 creates an egregiously high threshold for injured workers like Gary Walston. Justice Wiggins, writing for the dissent in *Walston*, offered an alternative reading that merits consideration:

> Thus, to show "deliberate intention" under RCW 51.24.020, a plaintiff must show that an employer knew with a high degree of confidence that injury would result and yet willfully disregarded that knowledge. This interpretation gives effect to the legislature's intent to hold an employer accountable when the employer deliberately intends to produce a disease.[165]

It is worth noting that the dissent's reading is largely based on the presumption that diseases stemming from toxic exposure are the result of a "specific injurious process" that begins with toxic contact.[166] The majority expressly rejected this position, reaffirming earlier cases holding that asymptomatic cellular-level injury merely created a risk of

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163. Walston v. Boeing Co., 181 Wash. 2d 391, 401, 334 P.3d 519, 524 (2014) (Wiggins, J., dissenting).

164. Dennis v. Dep't of Labor & Indus., 109 Wash. 2d 467, 472–74, 745 P.2d 1295, 1298–99 (1987).

165. *Walston*, 181 Wash. 2d at 403, 334 P.3d at 525 (Wiggins, J., dissenting).

166. *See id.* at 402–03, 334 P.3d at 524 (recognizing the damaging effects of asbestos upon inhalation); *id.* at 404, 334 P.3d at 525 ("Here, exposure to asbestos caused immediate and certain scarring in Walston's lungs—under the statute, this satisfies the injury requirement once and if the scars develop into a compensable disease.").

compensable injury.[167] In situations where a substance inflicts immediate and certain injury—such as pulmonary scarring in the case of asbestos—that later develops into a compensable disease, the dissent's standard would allow for recovery outside the IIA if the exposure was the result of an employer's intentional act.[168]

On balance, Justice Wiggins' proposed reading would be an improvement to the standard currently used by the Court. By lowering the required level of certainty, it would permit victims of intentional exposure to seek relief outside of the accident-based workers' compensation regime. Plaintiffs exposed to toxins known to create a high risk of disease would stand a much better chance of surviving summary judgment. At the same time, it is not likely to lead to a flood of litigation because substantial probability of injury would still be insufficient to meet the standard.[169]

If the Supreme Court of Washington were to take up this issue again, it should follow the *Walston* dissent's lead[170] and consider the nature of the toxic substance and the ways in which other jurisdictions have determined when injury occurs.[171]

B. A New Opportunity

Birklid v. Boeing Co. was a unanimous decision that set the course for deliberate intention jurisprudence in Washington for the next twenty years.[172] *Walston v. Boeing Co*. nearly changed that course in a 5–4 decision.[173] One member of the majority at the time of the *Walston* decision was Judge Leach, an appellate judge serving as justice pro tem.[174] Justice Yu, a recent appointment to the Supreme Court of Washington at the time, did not participate in the decision.[175] Only four members of the *Walston* majority remain on the state's highest bench.[176] If a case like Gary Walston's were to reach the high court in its current composition, an adjustment to the *Birklid* standard could be on the horizon.

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167. *See id.* at 398, 334 P.3d at 522–23 (majority opinion).

168. *Id.* at 404, 334 P.3d at 535 (Wiggins, J., dissenting).

169. *Id.* at 408, 334 P.3d at 528.

170. *Id.*

171. One remaining question is how the dissent's interpretation would apply to instances where toxic exposure did not inflict an immediate and certain injury on the worker, but did result in a compensable disease sometime later.

172. *See id.* at 393, 334 P.3d at 520 (majority opinion).

173. *Id.* at 391, 334 P.3d at 519.

174. *Id.* at 399, 334 P.3d at 523.

175. *Id.*

176. *Justices of the Supreme Court*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.justices [https://perma.cc/25M8-8AU9].

CONCLUSION

The IIA was instituted to provide sure and certain relief to workers injured on the job. It represented a legislative effort to overcome the unfortunate consequences of a working environment that was constantly evolving. As the effects of workplace toxins become more apparent and more costly, the caretakers of the state's workers' compensation system must adapt and ensure that no class of workers is forgotten. The *Birklid* standard, though sufficient when applied to instances where an employer's deliberate actions result in immediate harms to an employee, insufficiently accounts for injuries resulting from deliberate toxic exposures. In order to maintain the integrity of Washington's workers' compensation system for all workers, the *Birklid* standard must be relaxed enough to accommodate those who suffer from slower, more insidious injuries.