



1-1-1979

# Intentional Employer Torts and Workers' Compensation: A Legal Morass

Joseph H. Fagundes

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

 Part of the [Law Commons](#)

## Recommended Citation

Joseph H. Fagundes, *Intentional Employer Torts and Workers' Compensation: A Legal Morass*, 11 PAC. L. J. 187 (1979).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol11/iss1/11>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# Intentional Employer Torts and Workers' Compensation: A Legal Morass

The workers' compensation acts were originally enacted in response to the dismal plight faced by an employee injured on the job.<sup>1</sup> Prior to the passage of these acts the employee's burden of proof<sup>2</sup> and the various common law defenses available to the employer<sup>3</sup> erected a barrier that in many cases proved insurmountable to the employee.<sup>4</sup> Upon the enactment of workers' compensation legislation the injured worker was no longer required to prove negligence<sup>5</sup> but in return surrendered many actions previously available to him at common law.<sup>6</sup> Whether intentional torts inflicted by an employer upon an employee were among the actions relinquished by the worker has been a matter of some controversy and the dispute has proven particularly vexatious in the California courts.<sup>7</sup>

In the 1968 decision of *Azevedo v. Abel*,<sup>8</sup> the Third District Court of Appeal attempted to settle this area of the law<sup>9</sup> by holding<sup>10</sup> that intentional torts by an employer upon an employee were covered by the California Workers' Compensation, Insurance, and Safety Act<sup>11</sup> (hereinafter referred to as Workers' Compensation Act). Seven years later however, the First District Court of Appeal in *Magliulo v. Superior Court*,<sup>12</sup> held that the employee was entitled to either cumulative remedies at common law and in workers' compensation, or alternative relief,

---

1. See generally 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §4.30 (2d ed. 1978) [hereinafter cited as 1 LARSON].

2. *Id.*

3. *Id.*

4. *Id.*

5. 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION §1.05[1] (2d ed. 1979) [hereinafter cited as HANNA]; 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW §2 (8th ed. 1973) [hereinafter cited as WITKIN].

6. See 1 LARSON, *supra* note 1, at §1.10.

7. See, e.g., *Magliulo v. Superior Ct.*, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975); *Azevedo v. Abel*, 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968).

8. 264 Cal. App. 2d, 451, 70 Cal. Rptr. 710 (1968).

9. Comment, *Azevedo v. Abel: Denial of Employee's Right to Sue His Employer for an Intentional Tort*, 21 HASTINGS L.J. 683 (1970).

10. See 264 Cal. App. 2d at 457-60, 70 Cal. Rptr. at 714-16.

11. CAL. LAB. CODE §§3200-6002.

12. 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975).

giving the employee a choice between the two remedies.<sup>13</sup> Both *Magliulo* and *Azevedo* involved physical tort actions for assault and battery,<sup>14</sup> but later decisions have broadened the scope of the dispute to encompass nonphysical torts as well.<sup>15</sup>

In 1978 the decision of the Fourth District Court of Appeal in *Renteria v. County of Orange*<sup>16</sup> allowed a private action by the employee against the employer under the tort of intentional infliction of emotional distress, holding that workers' compensation was not meant to be the *exclusive* remedy for that tort.<sup>17</sup> In contrast, the First and Second District Courts of Appeal decided that a claim for workers' compensation *is* the exclusive remedy of the employee where physical illness and disability are alleged to accompany the emotional distress.<sup>18</sup>

Thus, the California appellate courts have dealt inconsistently with the issue of employer liability for intentional torts when juxtaposed with the provisions of the Workers' Compensation Act.<sup>19</sup> The central issue in these cases has been whether intentional employer torts should be included within the purview of workers' compensation.

The purpose of this comment is to determine whether the tort of intentional infliction of emotional distress comes under the exclusive remedies provision of workers' compensation and thus precludes a separate action at law. To this end, this comment will discuss: (1) the history and purpose of workers' compensation; (2) the treatment by the courts of intentional torts under the Workers' Compensation Acts; (3) the elements of the tort of intentional infliction of emotional distress; and (4) the applicability of workers' compensation to the tort of intentional infliction of emotional distress. The analysis presented in this comment will demonstrate that the essence of the tort of intentional infliction of emotional distress is incompatible with the theory and purpose of workers' compensation. Before a determination of the applicability of workers' compensation to the intentional infliction of emotional distress can be made, a brief review of the history and purpose of workers' compensation is needed.

---

13. *Id.* at 780, 121 Cal. Rptr. at 636.

14. 47 Cal. App. 3d at 763, 121 Cal. Rptr. at 624; 264 Cal. App. 2d at 453, 70 Cal. Rptr. at 711.

15. *See, e.g.*, *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 198, 155 Cal. Rptr. 486, 487 (1979); *Ankeny v. Lockheed Missiles and Space Co.*, 88 Cal. App. 3d 531, 533, 151 Cal. Rptr. 828, 829 (1979); *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 834-35, 147 Cal. Rptr. 447, 447 (1978).

16. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

17. *Id.* at 842, 147 Cal. Rptr. at 452.

18. 93 Cal. App. 3d at 206, 155 Cal. Rptr. at 492; 88 Cal. App. 3d at 535-36, 151 Cal. Rptr. at 831.

19. *See* text accompanying notes 64-69 and 81-97 *infra*. CAL. LAB. CODE §§3200-6002.

## WORKERS' COMPENSATION

*A. Historical Background*

Employee injuries in the nineteenth century were characterized as a "paradox of ever-increasing industrial injuries and ever-decreasing judicial remedies. . ."<sup>20</sup> While the great industrial revolution was picking up momentum, the "injured victims" were finding fewer remedies for their disabilities.<sup>21</sup> This reduction in employee recovery was in large part linked to the rise of the three "common-law defenses": contributory negligence, assumption of the risk, and the fellow-servant doctrine.<sup>22</sup> Another 40 percent of the injuries suffered by employees fell into the class of noncompensable injuries caused by inevitable accidents and acts of God, adding to the dilemma faced by the injured worker.<sup>23</sup> In addition, it was difficult to get testimony in favor of the employees since most witnesses were coemployees, who were naturally reluctant to testify against their employers.<sup>24</sup> Between the problems of increasing difficulty in proving employer liability and a concomitant growth in industrial injuries, the situation was painted by one commentator as a "complete. . . picture of helplessness."<sup>25</sup>

*B. Purposes of Workers' Compensation*

After various efforts to lessen the harshness of the common law,<sup>26</sup> the workers' compensation statutes began to appear<sup>27</sup> based on the underlying theory of liability without fault.<sup>28</sup> In Article XIV, Section 4 of the California Constitution<sup>29</sup> this concept was stated by providing that the legislature is

vested with plenary power, unlimited by any provision of this consti-

20. 1 LARSON, *supra* note 1, at §4.30.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. There were judicial and legislative efforts to abrogate the common law defenses. *Id.* §§4.40, 4.50.

27. *See id.* §5.20. California's first workers' compensation act, the Roseberry Act, went into effect on September 1, 1911. *See* CAL. STATS. 1911, c. 399, §§1, 2, at 796. This noncompulsory act was followed by California's first compulsory act, effective in 1914. *See* CAL. STATS. 1913, c. 176, at 279. An amendment to the California Constitution paved the way for a complete overhauling of the workers' compensation system. CAL. CONST., art. XX, §521 (*added* 1911, *amended* 1918). This provision now appears in an amended form at Article XIV, Section 4. Finally, the Workmen's Compensation, Insurance and Safety Act became effective as of January 1, 1918. CAL. STATS. 1917, c. 586, at 831. It is this law which with its subsequent amendments has remained in effect to the present day. *See* HANNA, *supra* note 5, at §1.04[3][d].

28. *See* HANNA, *supra* note 5, at §1.05[1]; WITKIN, *supra* note 5, at §2.

29. This provision was found in Article XX, Section 21 prior to 1976 and some of the quotes in this comment refer to that former constitutional provision which is now found in Article XIV, Section 4 of the California Constitution.

tution, to create and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by said workmen in the course of their employment, irrespective of the fault of any party.<sup>30</sup>

Decisions of the California Supreme Court have expounded further upon the purposes of the Workers' Compensation Act. The court has noted that the Act was proposed "to protect individuals from any 'special risks' of employment"<sup>31</sup> and "to protect workmen, in proper cases, from economic insecurity."<sup>32</sup> In *Union Iron Works v. Industrial Accident Commission*,<sup>33</sup> the California Supreme Court added the

economic thought that personal injury losses incident to an industry is [sic] a part of the costs of production to be borne, just as the depreciation and replacement of a machine is borne, by the industry itself, which compensation will be included in the cost of the product of the industry.<sup>34</sup>

It is evident from these pronouncements that the court viewed workers' compensation as a reaction to the proliferation of noncompensable industrial injuries.

Another well-recognized purpose of workers' compensation is the provision of prompt compensation for industrial injuries.<sup>35</sup> Full coverage of medical expenses aids the injured employee with his rehabilitation effort, while subsistence compensation helps fill the void in lieu of his salary. As a result, the employee and his dependents are able to stave off the financial hardship that previously attended disabling industrial injuries.<sup>36</sup>

### C. Statutory Framework of the Law

Labor Code Section 3600 lists the conditions for compensation that must be met in order to establish the applicability of workers' compensation to a particular injury.<sup>37</sup>

---

30. CAL. CONST., art. XIV, §4.

31. *Laeng v. Workmen's Comp. Appeals Bd.*, 6 Cal. 3d 771, 774, 100 Cal. Rptr. 377, 378, 494 P.2d 1, 2 (1972).

32. *Marsh v. Industrial Acc. Comm.*, 217 Cal. 338, 345 (1933).

33. 190 Cal. 33 (1922).

34. *Id.* at 39.

35. See HANNA, *supra* note 5, at §1.05[3].

36. See *id.* §1.05[5][b], [c].

37. Section 3600 of the California Labor Code provides:

Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in Section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation occur:

The conditions of compensation are: that both the employee and employer must be subject to the relevant compensation provisions of that division of the Labor Code;<sup>38</sup> that the injury take place at a time when the employee is performing a service which grows out of and is incidental to his employment and is acting within the course of such employment;<sup>39</sup> and that the injury must be proximately caused by the employment "either with or without negligence."<sup>40</sup> There are also provisions limiting the applicability of the workers' compensation jurisdiction if the injury was self-inflicted, caused by the worker's intoxication, or resulted from an altercation in which he was the aggressor; furthermore, death benefits are not recoverable where the employee "willfully and deliberately caused his own death."<sup>41</sup>

Unlike most such acts,<sup>42</sup> the California version provides for compensation for "injury"<sup>43</sup> instead of "accident," and this seemingly innocuous substitution has been the cause of much furor. Although this language has been used to support the contention that intentional employer torts were meant to be covered by workers' compensation, one commentator has stated that it was intended only to include all occupational diseases.<sup>44</sup>

The exclusive remedy section on its face purports to make workers' compensation the sole remedy available to the employee whenever the conditions of compensation exist.<sup>45</sup> However, another section within

---

(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

(c) Where the injury is proximately caused by the employment, either with or without negligence.

(d) Where the injury is not caused by the intoxication of the injured employee.

(e) Where the injury is not intentionally self-inflicted.

(f) Where the employee has not willfully and deliberately caused his own death.

(g) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

(h) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where such activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post such a notice shall not constitute an expression of intent to waive the provisions of this subdivision.

(Subdivision (h) added in 1978).

38. CAL. LAB. CODE §3600; see 1 LARSON, *supra* note 1, at §1.10.

39. CAL. LAB. CODE §3600.

40. *Id.*

41. *Id.*

42. 1 LARSON, *supra* note 1, at §1.10.

43. CAL. LAB. CODE §3600.

44. HANNA, *supra* note 5, at §1.04[3][c].

45. Section 3601 of the California Labor Code provides as follows:

(a) Where the conditions of compensation exist, the right to recover such compensa-

the act provides for express exceptions to this concept of exclusivity. This provision also has been the source of much dispute among the various appellate courts in regard to intentional torts by an employer.<sup>46</sup> The controversy revolves around these express exceptions and whether any are *implied* for injuries that were never meant to be enveloped by workers' compensation.<sup>47</sup>

Of great importance here is Labor Code Section 4553 which provides for a one-half increase in compensation benefits for the "serious and wilful misconduct" of the employer or one of his enumerated agents.<sup>48</sup> Only two states have provisions similar to this statute.<sup>49</sup> This particular code section has been the source of much of the controversy surrounding intentional torts by employers and plays a significant role in the analysis of the cases.

---

tion, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment, except that an employee, or his dependents in the event of his death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against such other employee, as if this division did not apply, in either of the following cases:

(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee.

(2) When the injury or death is proximately caused by the intoxication of such other employee.

(b) An act which will not sustain an independent action for damages against such other employee under paragraph (1) or (2) of subdivision (a) of this section may nevertheless be the basis of a finding of serious and willful misconduct under Section 4553 or 4553.1 if (1) such other employee is established to be one through whom the employer may be charged under Section 4553; (2) such act of such other employee shall be established to have been the proximate cause of the injury or death; and (3) such act is established to have been of a nature, kind, and degree sufficient to support a finding of serious and willful misconduct under Section 4553 or 4553.1.

(c) In no event, either by legal action or by agreement whether entered into by such other employee or on his behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by such other employee under paragraph (1) or (2) of subdivision (a) of this section.

(d) No employee shall be held liable, directly or indirectly, to his employer, for injury or death of a coemployee except where the injured employee or his dependents obtain a recovery under subdivision (a) of this section.

CAL. LAB. CODE §3601.

46. See notes 69 and 84-87 and accompanying text *infra*.

47. See *Magliulo v. Superior Ct.*, 47 Cal. App. 3d 760, 772-73, 121 Cal. Rptr. 621, 630 (1975).

*But see Azevedo v. Abel*, 264 Cal. App. 2d 451, 459, 70 Cal. Rptr. 710, 715 (1968).

48. Section 4553 of the California Labor Code reads as follows:

The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and willful misconduct of any of the following:

(a) The employer, or his managing representative.

(b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.

(c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof. But such increase of award shall in no event exceed ten thousand dollars (\$10,000); together with costs and expenses incident to procurement of such award, not to exceed two hundred fifty dollars (\$250).

49. ARIZ. REV. STAT. §23-1022; MASS. GEN. LAWS. ANN. c. 152, §28.

The development of workers' compensation initially revolved around physical injuries. Problems arose, however, when causes of action were brought against the employer for physical intentional torts committed by him. The analysis used by the courts in dealing with these problems provided the foundation upon which the intentional infliction of emotional distress cases dealing with workers' compensation were decided.

## PHYSICAL INTENTIONAL TORTS AND WORKERS' COMPENSATION

### A. Development of the Idea

In 1951, *Conway v. Globin*<sup>50</sup> was decided by the Third District Court of Appeal. In that case the defendant employer allegedly assaulted the plaintiff, breaking two of his teeth. The plaintiff brought an action *at law*, but the employer defended on the theory that the only remedy available to the employee was workers' compensation.<sup>51</sup> The court allowed the damage action stating that an intentional tort was not a risk or condition incident to the employment.<sup>52</sup> Moreover, the court added that for assault to be a risk or condition of employment would not only work

to sanction indirectly conduct of the employer which is both tortious and criminal, but also would . . . permit the employer to use the Workmen's Compensation Act to shield him from his larger civil liability, which liability would exist independent of the common law defenses to personal injury actions by employees which prevailed prior to the advent of the Workmen's Compensation Act.<sup>53</sup>

The *Conway* decision was reversed 15 years later in *Azevedo v. Industrial Accident Commission*<sup>54</sup> (hereinafter referred to as *Azevedo I*) by a reconstituted Third District Court of Appeal. Thereafter *Azevedo v. Abel*<sup>55</sup> (hereinafter referred to as *Azevedo II*) established workers' compensation as the *exclusive* remedy of the employee whenever the conditions of compensation were found to exist regardless of the intentional nature of the tort.<sup>56</sup>

The facts in the *Azevedo* cases are relatively simple. On May 6, 1964, Mrs. Alice Azevedo was employed as the saleslady-manager at defendant Emanuel Abel's dress shop. Mrs. Azevedo, the plaintiff, had conversed with a dissatisfied customer while Abel was absent. Upon

---

50. 105 Cal. App. 2d 495, 233 P.2d 612 (1951).

51. *Id.* at 496, 233 P.2d at 613.

52. *Id.* at 498, 233 P.2d at 614.

53. *Id.*

54. 243 Cal. App. 2d 370, 374, 52 Cal. Rptr. 283, 286 (1966).

55. 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968).

56. *Id.* at 460, 70 Cal. Rptr. at 715-16.



his return the defendant was told about the telephone conversation and became angered, whereupon he kicked the plaintiff in the lower back.<sup>57</sup> Mrs. Azevedo suffered extensive injuries necessitating approximately \$900 in medical bills during the eleven months following the injury.<sup>58</sup>

In *Azevedo I*, the plaintiff filed a claim for workers' compensation as a result of the intentional injury inflicted by the employer. Subsequently, Mrs. Azevedo also filed a civil damage action against her employer in Superior Court. The Industrial Accident Commission ultimately dismissed the claim for workers' compensation because the injuries were the result of the employer's intentional act.<sup>59</sup> The dismissal was correct under the *Conway* rationale, but the appellate court reversed in an opinion that overruled *Conway*.<sup>60</sup>

The court stated that the legislature intended workers' compensation to be the sole remedy for intentional torts due to the use of the word "injury" and the use of the phrase "irrespective of the fault of any party" in the legislative and constitutional provisions.<sup>61</sup> The court also found that the inclusion of the latter phrase, coupled with the penalty provisions for "serious and wilful misconduct" of the employer, compelled the reversal of *Conway*, especially in light of the rule that the workers' compensation laws are to be liberally construed in favor of aiding the injured worker.<sup>62</sup> This "liberal" construction worked to preclude the employee's private action when the conditions of compensation coalesced.<sup>63</sup>

The court in *Azevedo I* decided that the Workers' Compensation Commission had jurisdiction when an intentional assault committed by an employer upon an employee was an act "fairly traceable to an incident of the employment" and not "the result of personal grievances unconnected with the employment."<sup>64</sup> Pursuant to this standard, the commission's order to dismiss was annulled and its jurisdiction over the matter was reinstated.<sup>65</sup> *Azevedo II* decided the one critical issue remaining unresolved by *Azevedo I*: whether "the commission's jurisdiction [and the remedy] is exclusive or whether superior court jurisdiction is in addition or an alternative to jurisdiction of the commission."<sup>66</sup>

---

57. 243 Cal. App. 2d at 372, 52 Cal. Rptr. at 284-85.

58. *Id.*

59. *Id.* at 371-72, 52 Cal. Rptr. at 284-85.

60. *Id.* at 373-74, 52 Cal. Rptr. at 285-86.

61. *Id.* at 374, 52 Cal. Rptr. at 286.

62. *Id.*

63. 264 Cal. App. 2d at 460, 70 Cal. Rptr. at 715-16.

64. 243 Cal. App. 2d at 376-77, 52 Cal. Rptr. at 287-88.

65. *Id.* at 377, 52 Cal. Rptr. at 288.

66. *Id.* at 373 n.1, 52 Cal. Rptr. at 285 n.1. After *Azevedo I* the superior court dismissed Mrs. Azevedo's damage action pursuant to a defense motion, while in the workers' compensation pro-

The court concluded in *Azevedo II* that there was no issue as to the substantive entitlement to workers' compensation benefits.<sup>67</sup> Mrs. Azevedo urged concurrent jurisdiction by the two tribunals along with concurrent liability and sought civil damages in addition to her compensation benefits. She argued that to confine the employee to workers' compensation shielded the employer from the "common law consequences of his intentional act," such as "general and punitive damages."<sup>68</sup> The court was unpersuaded stating that to allow "[a] damage suit as an alternative or additional source of compensation, becomes permissible only by carving a judicial exception in an uncarved statute." Again the court placed its reliance on the "penalty for serious and wilful misconduct" as being a sufficient sanction against deliberate torts. Labor Code Sections 3600 and 3601 were declared to be "the exclusive source of entitlement for covered injuries" since the policy choice was to provide the penalty in exchange for general damages.<sup>69</sup>

### *B. Choice of Alternative Remedies*

The reasoning of the *Azevedo* decisions was challenged in the First District Court decision of *Magliulo v. Superior Court*.<sup>70</sup> There the court concluded that until "an award of workmen's compensation is made and satisfied. . . or until a judgment is recovered in a civil suit for damages. . . the remedies can be treated as cumulative or at least alternative."<sup>71</sup>

The plaintiff, a waitress in defendant's restaurant, alleged that she was assaulted by her employer. Afterwards she filed an application with the Workmen's Compensation Appeals Board to adjudicate the claim but her employer filed an answer contesting the presence of the conditions of compensation.<sup>72</sup> Thereafter, the plaintiff filed a complaint in superior court seeking \$25,000 exemplary damages. The defendant's answer alleged that the plaintiff's exclusive remedy was for

---

ceedings Mrs. Azevedo was awarded temporary and permanent disability benefits. 264 Cal. App. 2d at 453, 70 Cal. Rptr. at 711. Mrs. Azevedo appealed the dismissal of her superior court action and Abel's insurer petitioned for review of the compensation award. The two actions were consolidated for review by the appellate court in *Azevedo II*. *Id.* The employer's insurance company's contention was rejected when the appellate court affirmed the award of the Workmen's Compensation Appeals Board. The court held that Insurance Code Section 533 and Civil Code Section 1668 prohibiting insurance and indemnification of willful injury did not apply to workers' compensation. The court decided that this holding was necessary in order to give effect to Insurance Code Section 11661 which prohibits an employer from insuring against the additional compensation which is assessed for "serious and willful misconduct" pursuant to Labor Code Section 4553. *Id.* at 457-58, 70 Cal. Rptr. at 714.

67. *Id.* at 456, 70 Cal. Rptr. at 713.

68. *Id.* at 458, 70 Cal. Rptr. at 714.

69. *Id.* at 459, 70 Cal. Rptr. at 715.

70. 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975).

71. *Id.* at 780, 121 Cal. Rptr. at 636.

72. *Id.* at 762-63, 121 Cal. Rptr. at 623-24.

workers' compensation.<sup>73</sup>

The employer contended that the damage action should be stayed so as to allow the Workmen's Compensation Appeals Board to determine whether the alleged injuries arose out of and occurred in the course of employment. The position of the employer coincided with the decision in the case of *Scott v. Industrial Accident Commission*.<sup>74</sup> The court in *Magliulo* distinguished *Scott* on the grounds that the tort involved in that case was simple negligence and such a tort obviously was within the purview of workers' compensation when the Section 3600 conditions of compensation were present.<sup>75</sup> If such conditions were not present, the remedy was one at law.<sup>76</sup> Hence, the concept of mutually exclusive remedies was entirely correct where negligence was involved,<sup>77</sup> in contrast to an assault where the *Magliulo* court declared that a final determination of jurisdiction by one tribunal would not preclude the exercise of jurisdiction by the other.<sup>78</sup>

The court then discussed *Carter v. Superior Court*<sup>79</sup> which had been decided after *Conway* and prior to *Azevedo*. In *Carter* the court had held that the first tribunal whose jurisdiction was invoked in an assault case could proceed while the other could not.<sup>80</sup> The *Magliulo* court found the *Carter* rule to be inconsistent with the rule in Section 3601 which allowed the cumulative remedies of workers' compensation and a common law damage action when the defendant was a fellow employee.<sup>81</sup> Further, the court in *Magliulo* asserted that "if the employee can recover both compensation and damages caused by an intentional assault by a fellow worker, he should have no less right because the fellow worker happens to be his boss."<sup>82</sup> In addition, the court pointed out<sup>83</sup> that exceptions to exclusivity existed where the employee was as-

73. *Id.*

74. 46 Cal. 2d 76, 293 P.2d 18 (1956). The *Scott* decision involved a civil action for damages and a subsequent workers' compensation proceeding. The court held that the workers' compensation should be stayed until the superior court decided which tribunal had jurisdiction over the matter since its jurisdiction was invoked first. The rationale for this holding was as follows:

The only point of concurrent jurisdiction of the two tribunals appears to be *jurisdiction to determine jurisdiction*; jurisdiction once determined will be exclusive, not concurrent . . . . If at the time of the accident there was no workmen's compensation coverage, then the commission is without jurisdiction to grant relief, and if there was such coverage then the superior court is without jurisdiction and must leave the parties to pursue their remedies before the commission . . . .

*Id.* at 83, 293 P.2d at 22.

75. See 47 Cal. App. 3d at 762, 121 Cal. Rptr. at 623. See text accompanying notes 37-41 *supra*.

76. *Id.* at 780, 121 Cal. Rptr. at 636.

77. *Id.*

78. See *id.*

79. 142 Cal. App. 2d 350, 298 P.2d 598 (1956).

80. *Id.* at 355-56, 298 P.2d at 601.

81. 47 Cal. App. 3d at 770-72, 121 Cal. Rptr. at 628-30.

82. *Id.* at 773, 121 Cal. Rptr. at 631.

83. See *id.* at 780, 121 Cal. Rptr. at 636.

saulted by a customer,<sup>84</sup> a supervisor,<sup>85</sup> and possibly a working partner.<sup>86</sup> The court found the reason for allowing these suits was applicable equally to acts by an employer and criticized *Azevedo II* for “erecting a straw man of exclusiveness” and thereby creating “an ostensible syllogism which leads to the preclusion of what was sought.”<sup>87</sup>

Further the *Magliulo* court criticized the *Azevedo II* court’s interpretation of the clause providing for compensation “irrespective of the fault of any party.”<sup>88</sup> The Supreme Court decision in *Mathews v. Workmen’s Compensation Appeals Board*<sup>89</sup> was relied upon<sup>90</sup> for the proposition that

the use of the phrase “irrespective of the fault of any party” in section 21 was intended only to give the Legislature power to grant benefits unhampered by common law tort concepts of negligence; it has never been construed as prohibiting the legislature from increasing, decreasing or even eliminating awards based upon the willful wrongdoing of a party.<sup>91</sup>

On the basis of this declaration by the Supreme Court,<sup>92</sup> the court in *Magliulo* concluded that a reading of the exclusivity provisions of Section 3601 in light of Section 3600 which refers to “without regard to negligence,” allowed the courts to determine the liability of an employer for an intentional tort inflicted upon an employee.<sup>93</sup>

At this point there was one more major conflict between *Magliulo* and *Azevedo II*: the provision for a 50% increase in compensation benefits for the “serious and wilful misconduct” of the employer.<sup>94</sup> The *Magliulo* court was confident that the provision was meant to apply only where the conduct fell somewhere “between ordinary negligence and an intentional tort.”<sup>95</sup> None of the early case law definitions had ever referred to an intentional assault as being included in the definition of “serious and wilful misconduct.”<sup>96</sup> Rather, the court held that the provision was intended to be an incentive for the employer to provide a safer place of employment. Application of the “serious and wil-

---

84. See CAL. LAB. CODE §3852.

85. See *id.* §3601.

86. See *Busick v. Workmen’s Comp. Appeals Bd.*, 7 Cal. 3d 967, 977, 104 Cal. Rptr. 42, 50, 500 P.2d 1386, 1394 (1972).

87. 47 Cal. App. 3d at 777, 121 Cal. Rptr. at 634.

88. *Id.*

89. 6 Cal. 3d 719, 100 Cal. Rptr. 301, 493 P.2d 1165 (1972).

90. 47 Cal. App. 3d at 768-69, 777, 121 Cal. Rptr. at 627-28, 634.

91. 6 Cal. 3d at 728, 493 P.2d at 1170, 100 Cal. Rptr. at 306.

92. 47 Cal. App. 3d at 769, 121 Cal. Rptr. at 628.

93. *Id.*

94. CAL. LAB. CODE §4553.

95. 47 Cal. App. 3d at 778-79, 121 Cal. Rptr. at 635.

96. See *Keeley v. Industrial Acc. Comm.*, 55 Cal. 2d 261, 359 P.2d 34, 10 Cal. Rptr. 636 (1961); *Mercer-Fraser Co. v. Industrial Acc. Comm.*, 40 Cal. 2d 102, 251 P.2d 955 (1953); *E. Clemens Horst Co. v. Industrial Acc. Comm.*, 184 Cal. 180 (1920).

ful misconduct" clause to intentional assault was held not to fulfill such a purpose.<sup>97</sup>

The existing precedents were construed strictly by the *Magliulo* court although it is difficult at best to reconcile *Magliulo* and *Azevedo II*.<sup>98</sup> The court placed *Azevedo II* into the category of a workers' compensation award that already had been made and satisfied.<sup>99</sup> In contrast to the *Magliulo* court's attempt to reconcile the two decisions, however, the *Magliulo* court also opined that the claim for alternative or cumulative remedies advanced by Mrs. Azevedo is "a preferable solution" and that it would have adopted such a contention had the question been one of first impression.<sup>100</sup> The court in *Azevedo II*, however, had disallowed the possibility of a damage suit as an alternative whenever the "conditions of compensation" were found to exist, even if an award of workers' compensation benefits had not been made and satisfied.<sup>101</sup> Under this reasoning neither Mrs. Azevedo nor someone similarly situated could pursue a private damage action once it was determined that the conditions of workers' compensation were met.

In the case of assault by an employer upon an employee, it can be seen that the California judiciary has developed two conflicting lines of thought on the remedies available to the employee.<sup>102</sup> One line makes the remedies mutually exclusive,<sup>103</sup> while the other allows them to be cumulative to the extent of joint jurisdiction and alternative in the sense of pursuing either remedy to final judgment.<sup>104</sup> Clearly, both theories cannot be compatible with the idea of workers' compensation because these two theories of recovery are mutually exclusive.<sup>105</sup> Looked at in terms of the history and purpose of workers' compensation, the reasoning of the court in the *Magliulo* case appears more logical in allowing the worker to pursue a civil remedy for the intentional tort.

The theory of workers' compensation recognizes that in today's industrial environment workers will be injured.<sup>106</sup> The cost of this injury, as stated by the California Supreme Court, should be borne by that

---

97. 47 Cal. App. 3d at 779, 121 Cal. Rptr. at 635.

98. *Id.* at 780, 121 Cal. Rptr. at 636.

99. *Id.*

100. *Id.* at 777, 121 Cal. Rptr. at 633-34.

101. See 264 Cal. App. 2d at 460, 70 Cal. Rptr. at 715-16.

102. See note 7, *supra*.

103. The Third District Court of Appeal is the only appellate court currently following the exclusivity theory.

104. Along with the First District which decided *Magliulo*, the Second District in *Meyer v. Graphic Arts Intern., Etc.*, 88 Cal. App. 3d 176, 178, 151 Cal. Rptr. 597, 598-99 (1979), and the Fifth District in *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 112, 137 Cal. Rptr. 797, 802 (1977), have embraced the *Magliulo* decision affirmatively.

105. See notes 87-100 and accompanying text *supra*.

106. See notes 20-25 and accompanying text *supra*.

industry.<sup>107</sup> For the state to include intentional torts within workers' compensation then seems to indicate that intentional torts are also inevitable injuries to be absorbed in the cost of production.<sup>108</sup> This reasoning leads to the inference that by allowing industry to absorb the cost of intentional torts merely as an incident of production, the courts are saying that intentional torts are acceptable in the work environment.<sup>109</sup> If indeed intentional torts are covered by workers' compensation, the payment of an insurance premium is not as great a deterrent to the employer as the payment of damages in a tort suit would be. Thus, encompassing intentional torts within workers' compensation tends to encourage rather than discourage such torts.

The California Supreme Court has not yet indicated whether either the *Azevedo* or *Magliulo* theory will be followed. Yet different California appellate courts have applied these theories to workers' compensation cases involving nonphysical torts in which an element of intent was present.<sup>110</sup> Before discussing the impact of workers' compensation on the tort of intentional infliction of emotional distress, it is necessary to discuss the development of this relatively new tort in California case law.

## INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

### A. Development in California

The law was slow to recognize that a person's interest in peace of mind was entitled to legal protection, independent of its connection with any other tort.<sup>111</sup> Only when some other tort was committed, such as assault, battery, false imprisonment, or seduction, would the courts allow a tort recovery to include damages resulting from emotional distress.<sup>112</sup> The California courts also allowed recovery for serious emotional distress where compensable physical injuries were shown to exist.<sup>113</sup> Eventually in *State Rubbish Collectors Association v. Siliznoff*,<sup>114</sup> the Supreme Court of California announced that "where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional conduct fell short of producing some physical injury."<sup>115</sup> This decision established

---

107. See text accompanying note 34 *supra*.

108. See text accompanying note 34 *supra*.

109. See text accompanying note 34 *supra*.

110. See notes 144-187 and accompanying text *infra*.

111. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 49 (4th ed. 1971).

112. *Id.* at 52.

113. *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 795, 216 P.2d 571-72 (1950); *Emden v. Vitz*, 88 Cal. App. 2d 313, 319, 198 P.2d 696, 700 (1948).

114. 38 Cal. 2d 330, 240 P.2d 282 (1952).

115. *Id.* at 338, 240 P.2d at 286.

the distinct tort of intentional infliction of emotional distress. The court did state that a jury could determine outrageous conduct as well as a physician could diagnose physical manifestations.<sup>116</sup>

Subsequent appellate decisions have defined more clearly the elements of the tort and the type of behavior necessary to allow recovery without physical manifestations of harm. The elements of a prima facie case of intentional infliction of emotional distress are: (1) outrageous conduct by the defendant; (2) intention to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of the emotional distress.<sup>117</sup> The first element, which deals with outrageous conduct, is of primary importance to the cause of action.

In *Newby v. Alto Riviera Apartments*,<sup>118</sup> the court identified three distinct instances in which behavior could reach the limits of outrageousness. The first takes place when the defendant abuses a relation or position which gives him power to damage the plaintiff's interest.<sup>119</sup> The second instance is when the defendant knows the plaintiff is susceptible to injuries as a result of mental distress.<sup>120</sup> The third situation constituting outrageous conduct is where the defendant acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress.<sup>121</sup>

### B. *Outrageous Conduct in Employment Environs*

Outrageous conduct in an employment setting was the subject of litigation well before the subject cases of this comment.<sup>122</sup> The key case dealing with intentional infliction of emotional distress on the job was the California Supreme Court decision in *Alcorn v. Anbro Engineering, Inc.*<sup>123</sup> The high court determined that a cause of action had been stated "which reasonably could lead the trier of fact to conclude that defendant's conduct was extreme and outrageous, having a severe and traumatic effect upon plaintiff's emotional tranquility."<sup>124</sup> The facts alleged by the plaintiff showed that he was a Black truck driver employed

---

116. *See id.*

117. *See Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 497-98, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970); *State Rubbish, etc., Ass'n v. Siliznoff*, 38 Cal. 2d 330, 337-38, 240 P.2d 282, 286 (1952); *Newby v. Alto Riviera Apartments*, 60 Cal. App. 3d 288, 296, 131 Cal. Rptr. 547, 552 (1976).

118. 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976).

119. *Id.* at 297, 131 Cal. Rptr. at 553.

120. *Id.*

121. *Id.*

122. *See Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); *Agarwal v. Johnson*, 81 Cal. App. 3d 513, 146 Cal. Rptr. 521 (1978) (*hearing granted* by the California Supreme Court); *Toney v. State*, 54 Cal. App. 3d 779, 126 Cal. Rptr. 869 (1976).

123. 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

124. *Id.* at 498, 468 P.2d at 218, 86 Cal. Rptr. at 90.

by Ambro Engineering, Inc., and a shop steward in the Teamster's Union. In his latter capacity he allegedly told another employee not to drive a certain truck to the job site because the employee was not a union member. When the plaintiff told defendant Palmer, a field superintendent, what he had told the employee, Palmer allegedly shouted at the plaintiff in a "rude, violent and insolent manner." Palmer called Alcorn, the plaintiff, a "goddam 'nigger'" and fired him. When Alcorn recounted the incident to defendant Thomas Anderson, Jr., Ambro's secretary, Anderson was alleged to have ratified Palmer's acts on behalf of Ambro.<sup>125</sup> The plaintiff further alleged that he suffered humiliation, mental anguish and emotional and physical distress.<sup>126</sup> As a result, Alcorn claimed to have been sick for several weeks thereafter suffering from shock, nausea, and insomnia, as well as an inability to work.<sup>127</sup>

Though the case did not involve any issue of workers' compensation, it is a key one in this area of the law for several reasons: (1) the court's emphasis upon the absence of a requirement of physical illness or disability;<sup>128</sup> (2) the fact that the court imputed the conduct of a supervisory employee to hold the company liable;<sup>129</sup> and (3) the special degree of protection from "insult and outrage" that an employee is entitled to from his employer.<sup>130</sup> Despite plaintiff's allegations of inability to work and physical manifestations of harm, the court focused on the *nonphysical* nature of the tort alleged, thereby suggesting that the invasion of mental and emotional tranquility alone is a sufficient basis in a tort action of this kind.<sup>131</sup> After recognizing that physical manifestations of harm were recoverable in an action for intentional infliction of emotional distress the court added that:

Moreover, the courts in this state have also acknowledged the right to recover damages for emotional distress alone, without consequent physical injuries, in cases involving extreme and outrageous intentional invasions of one's mental and emotional tranquility.<sup>132</sup>

Further, the allegations that the outrageous acts were ratified on behalf of Ambro were found sufficient to state a cause of action against the company for intentional infliction of emotional distress.<sup>133</sup> This imputation of liability is of great importance since some of the employment relationship cases discussed herein involve a supervisory employee

---

125. *Id.* at 496-97, 468 P.2d at 217, 86 Cal. Rptr. at 89.

126. *Id.* at 497, 468 P.2d at 217, 86 Cal. Rptr. at 89.

127. *Id.*

128. *See id.* at 498, 468 P.2d at 218, 86 Cal. Rptr. at 90.

129. *See id.* at 497-98, 468 P.2d at 217-18, 86 Cal. Rptr. at 89-90.

130. *Id.* at 498 n.1, 468 P.2d at 218 n.1, 86 Cal. Rptr. at 90 n.1.

131. *See id.* at 498, 468 P.2d at 218, 86 Cal. Rptr. at 90.

132. *Id.*

133. *Id.*



rather than an actual employer.<sup>134</sup>

The final item of importance determined in *Alcorn* was that abuse of the employment relationship can constitute outrageous conduct.<sup>135</sup> The court made it clear that an employee was entitled to special protection from such conduct by virtue of the employment relationship: "Thus, plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger to defendants."<sup>136</sup>

The subsequent appellate court decision in *Agarwal v. Johnson*<sup>137</sup> restated the *Alcorn* court's proposition concerning vicarious liability<sup>138</sup> and further held that even if there was no ratification or authorization of such acts, as was the case in *Alcorn*, the employer could be held liable for the wilful misconduct of his employees acting in a managerial capacity.<sup>139</sup> The case reiterated the concept that abuse of the employment relationship was a type of outrageous conduct which would establish a prima facie case of intentional infliction of emotional distress.<sup>140</sup>

Given that intentional infliction of emotional distress is characterized by an invasion of mental tranquility,<sup>141</sup> that tort would appear to fall outside the realm of workers' compensation which is geared towards work-related injuries of a physical nature.<sup>142</sup> Furthermore, in light of the controversy surrounding the application of workers' compensation to intentional torts, the argument against inclusion of intentional infliction of emotional distress within that statutory scheme appears even stronger. Three recent appellate court decisions<sup>143</sup> have done little to settle this area of the law, because of their failure to reach a consensus regarding the disposition of cases involving these controversies.

## INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND WORKERS' COMPENSATION: RECENT CALIFORNIA DEVELOPMENTS

### A. Private Action Allowed

*Renteria v. County of Orange*,<sup>144</sup> the first decision to discuss the

---

134. Two such cases are *Gates v. Trans Video*, 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979) and *Agarwal v. Johnson*, 81 Cal. App. 3d 513, 146 Cal. Rptr. 501 (1978).

135. 2 Cal. 3d at 497-98, 468 P.2d at 217-18.

136. *Id.* at 498 n.2, 468 P.2d at 218 n.2, 86 Cal. Rptr. at 90 n.2.

137. 28 Cal. App. 3d 513, 146 Cal. Rptr. 521 (1978). See also *Toney v. State*, 54 Cal. App. 3d 779, 126 Cal. Rptr. 869 (1976).

138. 81 Cal. App. 3d at 526, 146 Cal. Rptr. at 528.

139. 81 Cal. App. 3d at 526, 146 Cal. Rptr. at 528. *Accord*, *Kuchta v. Allied Builders Corp.*, 21 Cal. App. 3d 541, 549-50, 98 Cal. Rptr. 588, 592 (1971).

140. See 81 Cal. App. 3d at 525, 146 Cal. Rptr. at 528.

141. See notes 113-15 & 132 and accompanying text *supra*.

142. See note 30 and accompanying text *supra*.

143. See note 15 *supra*.

144. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

ramifications of an action against an employer for intentional infliction of emotional distress, held that a private suit was not precluded by the exclusivity provisions of workers' compensation.<sup>145</sup> In *Renteria*, the plaintiff was employed as an investigator for the Orange County Department of Social Services. He alleged that his employer and fellow employees intentionally treated him in a rude and degrading manner, placed him under surveillance, subjected him to lengthy interrogations, and discriminated against him because of his Mexican-American descent.<sup>146</sup> It was alleged that this was done in order to cause the plaintiff to resign or be fired, and to cause him humiliation, mental anguish, and emotional distress.<sup>147</sup> The defendants demurred on several grounds including an assertion that the Workers' Compensation Appeals Board had exclusive jurisdiction over the matter. The trial court agreed and sustained the demurrer resulting in the dismissal of the case.<sup>148</sup>

The appellate court reversed, concluding "that an employee's cause of action for intentional infliction of emotional distress constitutes an implied exception to the exclusive remedy provisions of Labor Code Section 3601."<sup>149</sup> This theory was based on the finding that emotional distress was not compensable in a workers' compensation proceeding<sup>150</sup> and on the assumption that the legislature could not have intended to preclude recovery for extreme and outrageous conduct.<sup>151</sup>

In its decision, the court concurred in a criticism previously made of the *Azevedo II* reasoning, by finding that situations exist where intentional torts come under the sole jurisdiction of the Workers' Compensation Act and yet are completely noncompensable.<sup>152</sup> Intentional infliction of emotional distress would be one of the noncompensable torts under *Azevedo II* in light of the *Renteria* court's finding that there was no decisional or statutory authority for the proposition that mental suffering, as such, is a compensable injury in a workers' compensation proceeding.<sup>153</sup> This latter point is reinforced by the fact that damages in a civil action for intentional infliction of emotional distress are recoverable even absent a showing of accompanying physical harm<sup>154</sup> while workers' compensation is directed only towards disabling injuries of a physical nature.<sup>155</sup>

---

145. *Id.* at 842, 147 Cal. Rptr. at 452.

146. *Id.* at 835, 147 Cal. Rptr. at 447.

147. *Id.*

148. *Id.* at 835, 147 Cal. Rptr. at 447-48.

149. *Id.* at 842, 147 Cal. Rptr. at 452.

150. *Id.* at 839, 82 Cal. Rptr. at 450.

151. *Id.* at 841, 147 Cal. Rptr. at 452.

152. *See id.* at 839, 147 Cal. Rptr. at 450.

153. *See id.*

154. *See notes 114-16 and accompanying text supra.*

155. 1 LARSON, *supra* note 1, at §2.40.

The *Renteria* court then addressed the issue of *damages* that were within the exclusive jurisdiction of workers' compensation yet noncompensable therein.<sup>156</sup> This class of damages, such as pain and suffering and loss of consortium, was lost during the grant of the benefits of workers' compensation.<sup>157</sup> In *Williams v. State Compensation Insurance Fund*,<sup>158</sup> the court held that a work-connected injury could not be divided into separate elements of damage even though some were unrelated to earning capacity and, therefore, noncompensable in a workers' compensation proceeding.<sup>159</sup> In *Williams* an injury to the groin that caused the loss of sexual performance was found to be just such an injury.<sup>160</sup> As a result, the employee's action at law was dismissed upon the force of the court's reasoning that workers' compensation was the exclusive remedy available to the employee regardless of whether the injury was compensable in respect to all elements of damage.<sup>161</sup>

The *Renteria* court made an important distinction between the facts before the court and those in the *Williams* case. Rather than an isolated type of noncompensable physical injury, the *Renteria* case dealt with "an entire class of civil wrongs outside the contemplation of the workers' compensation system."<sup>162</sup> Moreover, the court seized upon the aspect of intentional wrongdoing central to the controversy surrounding the *Azevedo-Magliulo* decisions as another reason to set *Williams* apart from *Renteria*. Since emotional distress is not a compensable injury, the court also held that the "serious and willful misconduct" provision would be a poor deterrent where "50 percent of nothing is still nothing."<sup>163</sup>

The court expressed its complete disagreement with the notion that such an outcome could have been intended by the legislature because:

[w]hile it is possible to believe that the Legislature intended that employees lose their right to compensation for certain forms of negligently or accidentally inflicted physical injuries in exchange for a system of workers' compensation featuring liability without fault, compulsory insurance, and prompt medical care, it is much more difficult to believe that the Legislature intended the employee to surrender all right to any form of compensation for mental suffering caused by extreme and outrageous misconduct by the employer.<sup>164</sup>

Thus, the *Renteria* court concluded that the tort of intentional infliction

---

156. 82 Cal. App. 3d at 840-41, 147 Cal. Rptr. at 451.

157. See note 155 *supra*.

158. 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975).

159. *Id.* at 121-22, 123 Cal. Rptr. at 815.

160. *Id.*

161. *Id.* at 123, 123 Cal. Rptr. at 816.

162. 82 Cal. App. 3d at 841, 147 Cal. Rptr. at 451-52.

163. *Id.*

164. *Id.* at 841, 147 Cal. Rptr. at 452.

of emotional distress does not come under the provisions of workers' compensation.

*B. Preclusion of Private Action*

Shortly after the *Renteria* decision was rendered, the First and Second District Courts of Appeal dealt with the issue of intentional infliction of emotional distress and the applicability of workers' compensation.<sup>165</sup> Both of the courts held that the exclusive remedy was workers' compensation because the employee had alleged physical illness and disability. If workers' compensation could provide any remedy at all, the courts theorized that the worker was forbidden from bringing an action at law against the offending employer.<sup>166</sup>

In *Ankeny v. Lockheed Missles and Space Co.*,<sup>167</sup> the plaintiff alleged that defendant deprived him of his job as union steward, transferred him from one job to another, passed him over for promotion twice, assigned him to tasks not appropriate to his labor grade, terminated his employment and subjected him to "many other acts of harassment."<sup>168</sup> The plaintiff further alleged that these acts were intended to cause emotional distress and were ratified by Lockheed.<sup>169</sup> Allegations of physical illness and "some permanent disability" caused by the above acts were enough to satisfy the trial court in sustaining the defendant's demurrer, on the grounds that "workers' compensation was the plaintiff's only remedy."<sup>170</sup> On appeal the court refused to allow the plaintiff a civil cause of action pursuant to the *Magliulo* decision by limiting that decision's applicability to cases involving physical assault.<sup>171</sup>

The *Ankeny* court then disposed of *Renteria* by asserting that the latter decision was correct insofar as neither physical illness nor disability was alleged, whereas the former case involved allegations of compensable physical injury and disability.<sup>172</sup> Though physical harm was alleged, the *Ankeny* court failed to deal with the theory that the essence of the action and of the tort lies in intentional infliction of emotional distress which is outside of the Workers' Compensation Act.<sup>173</sup>

The last court to consider the issue in the emotional distress actions

---

165. *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979); *Ankeny v. Lockheed Missles and Space Co.*, 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979).

166. *See* 93 Cal. App. 3d at 204, 155 Cal. Rptr. at 491; 88 Cal. App. 3d at 535-36, 151 Cal. Rptr. at 831.

167. 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979).

168. *Id.* at 534, 151 Cal. Rptr. at 830.

169. *Id.*

170. *Id.*

171. *Id.* at 534-35, 151 Cal. Rptr. at 830.

172. *Id.* at 535-36, 151 Cal. Rptr. at 831.

173. *See id.* at 531, 151 Cal. Rptr. at 828.

was the Second District Court of Appeal in *Gates v. Trans Video Corp.*<sup>174</sup> The decision relied on *Ankeny* as a correct statement of the law since physical illness and disability had been alleged.<sup>175</sup> However, there was an added twist to the fact pattern in that the employee already was disabled when the alleged intentional infliction of emotional distress occurred. He had suffered a back injury while on the job for his employer. Thereafter, he received both workers' compensation and sick pay.<sup>176</sup> When the sick pay ran out the employee went to see the general manager and an argument arose. Following this altercation, Gates, the employee, was informed by mail that he was fired. Upon returning some company property and picking up personal belongings at work, Gates again was confronted by Block, the general manager, who in the presence of several employees repeatedly shouted at the plaintiff, "Get out."<sup>177</sup> Testimony at trial showed the plaintiff had become a changed man as a result of the above events. He spoke daily of his termination, his condition became worse, he was preoccupied constantly with the above incidents, his friends visited him less frequently, and his sexual relations with his wife deteriorated. Medical tests showed no physical cause for the problems and eventually the plaintiff had to consult a psychologist and a neurologist.<sup>178</sup> The suit resulted in a \$40,000 verdict in favor of the plaintiff-employee.<sup>179</sup> This judgment was reversed upon the grounds that the *Ankeny* decision applied to the facts of this case.<sup>180</sup>

Before the *Gates* court made its determination as to exclusivity of remedies it had to decide whether the injury took place within the course and scope of employment.<sup>181</sup> Even though *Gates* had ceased working and had been fired before the second altercation, the court concluded that the incidents described were "directly connected with the employment relationship and being incident thereto, the employee is entitled to the protection of workers' compensation until he had left the premises."<sup>182</sup> Once this decision was reached the court's reasoning basically reiterated the *Ankeny* analysis.<sup>183</sup> However, a factual distinction in the two cases is worthy of note.

In *Gates*, the plaintiff had suffered an injury prior to and separate

---

174. 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979).

175. *Id.* at 204, 155 Cal. Rptr. at 491.

176. *Id.* at 198-99, 155 Cal. Rptr. at 487-88.

177. *Id.* at 199-200, 155 Cal. Rptr. at 488-89.

178. *Id.* at 201, 155 Cal. Rptr. at 489.

179. *Id.*

180. See text accompanying note 175 *supra*.

181. 93 Cal. App. 3d at 201, 155 Cal. Rptr. at 489.

182. *Id.* at 203-04, 155 Cal. Rptr. at 491. See also *Mitchell v. Hizer*, 73 Cal. App. 3d 499, 505, 140 Cal. Rptr. 790, 793 (1977).

183. 93 Cal. App. 3d at 204-06, 155 Cal. Rptr. at 491-92.

from the emotional distress. His back injury indisputably was subject to workers' compensation.<sup>184</sup> By no means could the emotional distress be causally linked to the initial on-the-job injury, but the court failed to clearly identify whether the alleged physical harm referred to the back injury or to physical manifestations of the emotional distress.<sup>185</sup> Such a separation of injuries has been recognized in California<sup>186</sup> and by a leading commentator on the subject.<sup>187</sup> Therefore, if the alleged physical injury that the court referred to was the back injury, then the reversal was decided erroneously in light of the controlling authorities. It would have been proper to strike the allegations of physical disability pertaining to the back injury but that deletion would not have necessitated barring the entire action. If the allegations of physical illness and disability referred to physical consequences of the emotional distress, the *Gates* decision was on all fours with *Ankeny*. This ambiguity was not resolved within the opinion.

An analogy to a deceit case involving workers' compensation is helpful to illustrate that intentional torts are separable from physical disability actions. In *Ramey v. General Petroleum Corporation*<sup>188</sup> an employee had suffered an injury caused by a third party that was compensable under workers' compensation. The employer deceived the employee, however, leading him to believe that a coemployee had injured him. The purpose of this deception was to avoid the indemnity liability that the employer had contracted to assume if the third party had been sued by the employee.<sup>189</sup> In such an instance, the court decided, the intentional injury is separable from the workers' compensation injury thereby giving the employee two actions, one at law for the intentional tort and one in workers' compensation for the initial injury.<sup>190</sup> This is so, the court noted, for three reasons: the legislature never intended fraud to be a risk of employment; the injury caused by fraud does not arise out of the employment; nor is the fraud proximately caused by the employment as these terms are used in the workers' compensation statutes.<sup>191</sup> Similarly, a case involving intentional infliction of emotional distress that occurred in the work environment is not necessarily covered by the exclusive remedies provision of workers' compensation because intentional torts such as deceit and inten-

---

184. *Id.* at 198-99, 155 Cal. Rptr. at 487-88.

185. *See id.* at 196, 155 Cal. Rptr. at 486.

186. *Ramey v. General Petroleum Corp.*, 173 Cal. App. 2d 386, 343 P.2d 787 (1959).

187. A. Larson, *Nonphysical Torts and Workmen's Compensation*, 12 CAL. W. L. REV. 1 (1975) [hereinafter referred to as *Nonphysical Torts*].

188. 173 Cal. App. 2d 386, 343 P.2d 787 (1959).

189. *Id.* at 392-93, 343 P.2d at 790.

190. See notes 185-187 and accompanying text *supra*.

191. *See* 173 Cal. App. 2d at 402-03, 343 P.2d at 797.

tional infliction of emotional distress are outside the risk of employment contemplated by the legislature.<sup>192</sup> Additionally, if the intentional tort of deceit does not arise out of the employment, even though perpetrated by the employer to lessen the liability which would be incurred in a suit at law, then there is no rational justification for saying that intentional infliction of emotional distress arises out of the employment, especially since both injuries are mental.<sup>193</sup> Finally, if the fact situation concerning deceit in *Ramey* where an employer committed fraud to protect the company is considered not to be proximately caused by the employment, then intentional infliction of emotional distress cannot be realistically considered as being caused by a similar employment situation.<sup>194</sup> Thus, under the *Ramey* analogy, intentional infliction of emotional distress would not come under the exclusive remedies provisions of workers' compensation.

Since the entire class of nonphysical wrongs is outside the contemplation of the workers' compensation system,<sup>195</sup> none of those wrongs should go even partially uncompensated merely because an element of the damage is jurisdictionally subject to workers' compensation. It is well established that the invasion of mental or emotional tranquility by outrageous conduct is compensable at law whether or not accompanied by physical manifestations of injury.<sup>196</sup> On the other hand, there is no indication that invasion of mental or emotional tranquility is recoverable or even contemplated to be recovered under workers' compensation.<sup>197</sup> Furthermore, the acceptance of intentional torts as being within the purview of workers' compensation tends to encourage rather than deter the commission of these outrageous acts since there is no economic punishment other than the payment of workers' compensation insurance premiums.<sup>198</sup> Therefore, following the essence of the tort of intentional infliction of emotional distress that focuses on the nonphysical mental injury, it is more in keeping with the purpose and intent of the Workers' Compensation Act to allow a private action for

---

192. *See id.*

193. *See id.*

194. *See id.*

195. See note 162 and accompanying text *supra*. See generally Nonphysical Torts, *supra* note 187, at 12-13, where Professor Larson states that:

if the *essence of the tort* in law is non-physical, and if the injuries are of the usual non-physical sort, with physical injury added to the list of injuries solely as a makeweight, the suit should not be barred. If the *essence of the action* is recovery for physical injury or death, however, the action should be barred [under the workers' compensation exclusive remedy provision] even if it can be cast in the form of a normally nonphysical tort.

*Id.* at 12-13 (emphasis added). It should be noted that while the analysis in this comment supports the essence of the tort theory, the essence of the action theory is *not* supported.

196. See notes 114-116 and accompanying text *supra*.

197. See note 153 and accompanying text *supra*.

198. See notes 106-109 and accompanying text *supra*.

emotional distress. Although the *Renteria* court was not faced with the situation where physical injuries coincided with the emotional distress, the rationale employed by the court indicates that such injuries that are compensable in a workers' compensation proceeding would be barred from recovery in a common law action. This course of action would best effectuate the policies of workers' compensation as well. The employee could be given cumulative remedies as compensation for two distinct injuries, one emotional and the other physical.<sup>199</sup>

As an alternative to cumulative remedies, the court could allow the employee a choice of recoveries as in *Magliulo*.<sup>200</sup> It is not enough to say that *Magliulo* is inapplicable to an emotional distress situation merely because it involved an assault.<sup>201</sup> The facts may be inapposite, but the reasoning is not. Clearly, intentional torts of a physical nature are more likely to be within the parameters of workers' compensation than are nonphysical torts, even assuming the latter include some element of physical illness or disability. What legal justification allows the employee-victim of an assault a choice of remedies while confining the employee-victim of intentional outrageous conduct to workers' compensation which cannot even remedy the dominant harm? No legally defensible basis is apparent in such a proposition and the *Magliulo* alternative would seem more consistent legally, short of allowing cumulative remedies.

There is a further inconsistency to be noted in the reasoning used both by the *Ankeny* and the *Gates* courts. Even though the Supreme Court decision in *Alcorn*<sup>202</sup> did not deal with the issue of the exclusivity of workers' compensation,<sup>203</sup> each of the two appellate court opinions distinguished *Alcorn* in the same way the *Renteria* decision was distinguished; on the grounds that neither physical injury nor disability was alleged.<sup>204</sup> Such a distinction was clearly erroneous, however, in that *Alcorn* expressly found some substance<sup>205</sup> to allegations of physical illness and disability in that decision.<sup>206</sup> This finding shows the mistaken reliance placed by the two lower court decisions upon a lack of alleged

---

199. This alternative admittedly creates a multiplicity of actions. It is this author's thought that such a problem is inevitable in reaching the just result.

200. See 47 Cal. App. 3d at 780, 121 Cal. Rptr. 636.

201. See note 171 *supra*.

202. 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

203. See *id.*

204. 93 Cal. App. 3d at 206, 155 Cal. Rptr. at 492; 88 Cal. App. 3d at 535, 151 Cal. Rptr. at 831.

205. See 2 Cal. 3d at 497-98, 468 P.2d at 218, 86 Cal. Rptr. at 90. (The court found enough substance to the allegations to hold that a cause of action was stated.)

206. *Id.* at 497, 468 P.2d at 217, 86 Cal. Rptr. at 89. The court recounted that the plaintiff alleged that he "was sick and ill for several weeks thereafter, was unable to work, and sustained shock, nausea and insomnia." *Id.*



physical illness and disability. The courts in *Ankeny* and *Gates* both intimated that their decisions may have been different if *Alcorn* had involved physical illness and disability.<sup>207</sup> However, this distinction was without merit in that *Alcorn* did involve allegations of physical illness and disability.<sup>208</sup>

Though the courts in *Renteria* and *Gates* distinguished *Ankeny* factually<sup>209</sup> in their denial of a common law action this distinction between the cases did not warrant the results as stated above. Moreover, the emotional distress decisions where physical illness and disability were alleged have not taken into account the nature of the tort itself, the possibility of alternative remedies, or the inappropriateness of the workers' compensation remedy.<sup>210</sup> As a consequence of this distinction, an entire class of nonphysical wrongs goes uncompensated. Therefore, the *Ankeny* result is preferable to *Renteria* and *Gates* in that it provides a remedy for this class of wrongs which is more in keeping with the legislative intent behind the Workers' Compensation Act.

#### CONCLUSION

Currently, private actions for intentional infliction of emotional distress by an employee against an employer will be dismissed, should the employee plead any physical illness or disability, pursuant to the exclusivity provisions of the Workers' Compensation Act.<sup>211</sup> However, *that same employee* pleading only emotional harm will be allowed to bring an action at common law.<sup>212</sup> To allow mere pleading technicalities to be determinative of the result in this situation is incongruous at best, particularly in view of the Workers' Compensation Act's emphasis upon physical injury, while the tort of intentional infliction of emotional distress involves an invasion of emotional tranquility.

The California judiciary should reconcile this inconsistency by allowing actions for nonphysical, intentional torts to be pursued at common law while the physical injuries that result from nonintentional work-related incidents should come within the sole jurisdiction of the Workers' Compensation Act. This response by the courts is required to effectuate the joint policies of the Workers' Compensation Act and the common law of torts. The clarity achieved through implementing these recommendations would bring order to an area of the law currently

---

207. See 93 Cal. App. 3d at 205-06, 155 Cal. Rptr. at 492; 88 Cal. App. 3d at 535, 151 Cal. Rptr. at 831.

208. See notes 205-206 *supra*.

209. See notes 172 and 183 *supra*.

210. See 93 Cal. App. 3d 196, 155 Cal. Rptr. 486; 88 Cal. App. 3d 531, 151 Cal. Rptr. 828.

211. See notes 165-166 *supra*.

212. See notes 146-151 *supra*.

characterized by confusion. In the alternative, the legislature could act to remedy the situation by stating that the Workers' Compensation Act does not include intentional torts, especially intentional infliction of emotional distress.

*Joseph H. Fagundes*

