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Nonphysical Torts and Workmen's Compensation*

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When one thinks of workmen's compensation, what comes to mind is traumatic injury, occupational disease and similar physical harms associated with the employment. It is difficult to imagine, however, what workmen's compensation can have in common with such essentially non-physical torts as deceit, defamation and intentional infliction of emotional distress.

This apparently improbable interplay occurs, not because compensation benefits are affirmatively awarded for such non-physical injuries; but rather, because the exclusive-remedy feature of the compensation act is sometimes invoked by an employer or insurer as a defense to a tort suit in this category. A California Supreme Court decision, *Unruh v. Truck Insurance Exchange*,[1] has thrown the spotlight on this hitherto somewhat obscure problem—partly because of the almost theatrical pathos of the factual story, and partly because of the equally dramatic legal rationale adopted by the court. The essence of the holding was that an insurance carrier is not protected by the exclusive-remedy clause from a suit by a young woman for intentional infliction of emotional distress which resulted in a physical and mental breakdown. The conduct producing this distress was that of an insurance investigator who, without revealing his purpose, caused the plaintiff to become emotionally interested in him. During this time, he was secretly compiling evidence to show that she was faking the continuance of back symptoms for which she was drawing compensation bene-

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1. 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972). This case is described and analyzed in detail in the text accompanying note 31 *infra*.

fits. At the hearing, films of her activities in the company of the investigator were shown, and the sudden discovery of this perfidy produced a shock which actually resulted in hospitalization.

Before further analyzing this climactic development in the story of non-physical torts in relation to workmen's compensation, it would be useful to sketch the state of the law as it had slowly unfolded up to this point.

At first glance, it might seem self-evident that the exclusive-remedy provision would never apply to such torts as false imprisonment, libel, malicious prosecution, fraud, deceit, malicious misrepresentation and intentional infliction of emotional distress.[2] The reason for this is the fact that ordinarily these torts would not come within the basic coverage formula of the typical workmen's compensation act: "Personal injury by accident arising out of and in the course of employment." The matter is complicated, however, by the fact that occasionally a tort of this type will in some way become intertwined with a compensable injury. The question then becomes more refined. It is not whether the tort action will lie when no workmen's compensation claim is possible; but rather, it is whether a tort action will lie when a compensation claim is also possible, and indeed, may have been filed and granted. When no compensation remedy is available, these tort actions fall squarely within the broad class of cases which do not come within the fundamental coverage pattern of the act at all, such as when certain occupational diseases are excluded from the act[3] or when the incident does not arise out of and in the course of employment.[4]

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2. *See* the dictum in *In re* Madden, 222 Mass. 487, 489, 111 N.E. 379, 381 (1916), citing cases which have determined that these torts are "personal injuries;" but which presumably would not be personal injuries under the Workmen's Compensation Act. *See also* Cohen v. Lion Prods. Co., 177 F. Supp. 486, 489 (D. Mass. 1959), which in citing *In re Madden*, determined that deliberate harassment causing emotional distress would not be a "personal injury" compensable under the Massachusetts Workmen's Compensation Act so as to bar a suit. The suit was dismissed on other grounds, however.

3. *See, e.g.*, Niles v. Marine Colloids, Inc., 249 A.2d 277, 278 (Me. 1969). Since pulmonary emphysema is neither an accidental injury nor a listed occupational disease, the exclusiveness of the act does not come into play.

4. *See, e.g.*, Davis v. Drilling & Exploration Co., 3 Cal. Rptr. 681 (2d Dist. 1960), *rehearing granted*, (unpublished). The claimants alleged in a tort action that their employer failed to provide medical facilities for ten days after they became seriously ill in Brazil. In addition, they also contended that he owed them back wages for breach of an employment contract. The employer obtained a summary judgment at the trial level on the theory that the claims based upon the illness were within the exclusive jurisdiction of the Industrial Accident Commission. The appellate court reversed the judgment on grounds that the employer had not demonstrated that the illnesses did arise out of and during the course of employment.

I. FALSE IMPRISONMENT

Several courts have held that an action for false imprisonment is not barred by the exclusive-remedy clause. In *Smith v. Rich's, Inc.*,[5] a saleslady was allegedly escorted to and detained for five hours in the "protection department" of the store by her supervisor and other employees of the store in connection with an apparent shortage of money. Her suit for false imprisonment and assault was sustained on the basis of the allegation that the co-employees had acted at the insistence and direction of the employer and not independently. Somewhat comparable is *Barnes v. Chrysler Corp.*,[6] in which company guards assaulted and imprisoned employees who were attempting to submit grievances to the corporation's management. The court allowed the suit, distinguishing situations in which assaults by foremen arise out of ordinary frictions on the job.

The point of these cases is that when the employer's responsibility was direct and actual because the tort was the result of intentional employer policy, this alone might be enough to defeat the exclusive-remedy defense. In *Smith*, the court had adequate grounds for its holding by virtue of the argument that the injuries were not accidental, but rather, were intentional and malicious on the part of the employer. In *Barnes*, the emphasis was upon the deliberate intention of the corporate employer to employ imprisonment and assault in a labor dispute.

In a later case[7] with a factual situation similar to *Smith*, also involving the application of Georgia law, the Fifth Circuit reached the same conclusion but with more emphasis upon the inappropriateness of applying the bar to the tort of false imprisonment as such. A department store employee alleged that she had been detained for one and a half hours by other employees of the store, including the credit manager, in an attempt to make her confess that she had stolen merchandise. The court stated that no law had been adduced which would support the proposition that the alleged injuries supported a claim for compensation. The court, among other arguments, used the one principally relied upon in *Smith*; that is, that the injury was not by accident because there had been no accident. The court concluded that it could not interpret the act to destroy a cause of action unless that cause of

5. 104 Ga. App. 883, 123 S.E.2d 316 (1961). The trial court granted summary judgment for the employer upon the theory that the exclusive remedy was workmen's compensation; however, the appellate court reversed the decision.
6. 65 F. Supp. 806 (N.D. Ill. 1946).
7. Skelton v. W.T. Grant Co., 331 F.2d 593 (5th Cir. 1964).

action was for an injury for which a remedy had been provided by the compensation act.[8]

A similar result was reached in Michigan in still another department store case.[9] This time the emphasis was most clearly upon the lack of relation between the kind of injuries involved and the injuries covered by the compensation act. Embarrassment, humiliation and deprivation of personal liberty, said the court, were not the sort of "personal injuries" contemplated by the act. The act dealt with physical and mental injuries arising out of the course of employment, while the essence of false imprisonment was unlawful detention quite apart from any physical or mental harm. The court was able to cite a specific amendment to the Michigan act stating that it is only when the conditions of coverage exist that the exclusive-remedy provision applies.

If all the cases were as factually "pure" as this Michigan case, there would be little controversy to discuss. What complicates this category of cases is the additional fact that personal injury is sometimes alleged as one of the consequences of the false imprisonment.[10] In this type of case, unless the court can, as in *Smith*, find true intentional wrongdoing on the part of the employer, the controlling argument must be that the essence of the tort is not physical injury but deprivation of liberty, and that the physical or mental harm is incidental and not an indispensable ingredient of the tort. This is undoubtedly the real situation in most of these cases, with the personal injury allegation sometimes thrown in as a makeweight. Normally, it is unlikely that the claimant has lost working time or incurred hospital and medical bills as a result of the false imprisonment.

It is possible to postulate a set of facts in which this element becomes critical, however. First, suppose that the imprisonment is the impulsive act of a foreman in the course of a quarrel with a workman. Then suppose that the claimant, as a result of being locked in a broom closet for an hour, suffers a complete physical and mental breakdown resulting in total disability and entailing large hospital and medical expenses. Although the form of the

8. The breadth of this statement, which was immaterial for the immediate purpose, requires some refining in the situation where the accident is covered but the particular element of damage is not. *See* 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 65.20 (1975) [hereinafter cited as LARSON].

9. Moore v. Federal Dep't Stores, Inc., 33 Mich. App. 556, 190 N.W.2d 262; Annot., 46 A.L.R.3d 1275 (1971).

10. In *Smith v. Rich's, Inc.*, for example, there appears to have been no physical injury in the compensation sense, but since the "accidental" ground was adequate, the court did not deem it necessary to place importance on this potential additional argument.

conduct is false imprisonment, the essence of the injury is no longer humiliation, but is instead severe physical disability. Plainly this disability would be compensable. But should it also be grounds for a tort suit against the employer? It clearly should not; the action of the foreman should not be attributed to the employer as intentional and malicious conduct on his part.[11]

It was just as "accidental" from the victim's point of view as a simple assault. It arose out of and in the course of the employment, from a work-connected fight, and produced the kind of injuries the act is concerned with. The case cannot be distinguished from a simple assault by the foreman producing the same injuries. Indeed, his action was an assault and battery as well as a false imprisonment.

II. DECEIT: SINGLE V. DUAL INJURY

The case involving allegations of deceit, fraud and false representation can best be sorted out by distinguishing those situations where the deceit precedes and helps produce the injury, and those where the deceit follows the injury and produces a second injury or loss.

In the first category, a tort action has usually been barred, since the deceit, so to speak, merges into the injury for which a compensation remedy is provided. In *Buttner v. American Bell Telephone Co.*,[12] the plaintiff employee alleged in a deceit action that he had been injured by the employer's deliberate misrepresentation about the nature of carbon tetrachloride. The case was dismissed on the ground that the California Workmen's Compensation Act expressly provides a penalty for the wilful misconduct of the employer in the form of increased compensation.[13] Similarly, in two Louisiana cases,[14] attempts to sue for fraud were struck down when the gist of the complaint was that the employer had concealed the hazards of employment in a sugarhouse.

If the injury induced by the deceit is only an aggravation of the first injury, there is still only one injury since the combination

11. *See* 2 LARSON, *supra* note 8, § 68.21.

12. 41 Cal. App. 2d 581, 107 P.2d 439 (2d Dist. 1940). *Accord* Sarber v. Aetna Life Ins. Co., 23 F.2d 434 (9th Cir. 1928) (involving a similar factual situation in an action against an employer's compensation carrier).

13. CAL. LABOR CODE § 4553 (West 1955) (fifty percent increased compensation; maximum penalty of $7,500).

14. Boyd v. American Mut. Liab. Ins. Co., 11 So. 2d 102 (La. App. 1942); Brooks v. American Mut. Liab. Ins. Co., 7 So. 2d 658 (La. App. 1942). The complaints were based on the theory that the claimants had been induced to accept employment and coverage under act by the fraudulent non-disclosure of the true extent of the dangers of the particular employment.

of original injury and aggravation is compensable as a unit. In an Ohio case,[15] the plaintiff alleged that his silicosis had been aggravated by the fact that his employer intentionally misrepresented the results of a medical examination showing that the plaintiff was suffering from the disease. The tort action was dismissed in this case. It should be pointed out, however, that to make this case fit within the present analysis, one must resort to the concurring opinion of Judge Ross. The majority opinion takes the extreme view that no action of any kind can be taken against an employer complying with the compensation law, whether or not the injury is compensable under that law. Judge Ross, however, pointed out that such actions as libel, slander, malicious prosecution, false representation and fraud might be maintainable even in an employment setting. He then stressed that the weakness in the present case was that the injury alleged to have been caused by the fraud was precisely the injury for which the employee had previously been allowed compensation, and that to allow the present action would be to give double satisfaction for a single injury. Judge Ross distinguished the kind of fraud case in which the claimant is made to lose his compensation remedy by fraud, since a remedy for such a fraud would not be drawn from compensation under the act and would not result in double recovery.

This distinction by Judge Ross leads us directly into the second class of cases, those that may sustain a tort suit because the second injury is a separate one. In several cases the alleged deceit has acted not upon the plaintiff's physical condition, but upon his legal rights under the compensation act. One type of situation is that in which the worker alleges that his employer and a doctor conspired to submit a false medical report resulting in the worker being deprived of those compensation benefits to which he was entitled. In a case arising under the Longshoremen's and Harbor Workers' Compensation Act,[16] *Flamm v. Bethlehem Steel Co.*,[17] this allegation was held as grounds for a cause of action free of the exclusiveness bar. The court pointed out that the alleged fraud occurred two years after the date of injury itself.

Similar in principle, although the right destroyed was one against a third party, is the holding in the California case of *Ramey*

15. Bevis v. Armco Steel Corp., 86 Ohio App. 525, 93 N.E.2d 33 (1949), *appeal dism'd per curiam*, 153 Ohio St. 366, 91 N.E.2d 479 (1950), 155 Ohio St. 613, 99 N.E.2d 614 (1951), *cert. denied*, 340 U.S. 810 (1950).

16. 33 U.S.C. §§ 901-50 (1960).

17. 18 Misc. 2d 154, 185 N.Y.S.2d 136 (1959), *aff'd mem.*, 10 App. Div. 2d 881, 202 N.Y.S.2d 222 (1960). *See also* the dictum in Clark v. Amos, 144 Kan. 115, 58 P.2d 81 (1936).

v. General Petroleum Corp.[18] The employee sued his own employer, a petroleum company, and a third party drilling company, charging a conspiracy between them to conceal the existence of the employee's common-law action against the drilling company. According to the complaint, the employee was injured while working in an oil field, due to the negligence of the drilling company. Two days after the accident, representatives of the employer told the employee that it had been his own employer's employees who had caused the accident. It should be noted that the employer had a hold-harmless agreement with the drilling company to reimburse it for any tort liability resulting from the drilling operations. The court sharply distinguished the two injuries involved: First, the personal and physical injury compensated by the act; and second, the fraud injury destroying a valuable right of action against the third party by causing the right to lapse because of the running of the statute of limitations. The second injury actually occurred two days after the first, just as the conspiracy injury in *Flamm* had occurred two years after the compensable injury. For another variation of the destruction-of-cause-of-action tort, one should see *Pirocchi v. Liberty Mutual Insurance Co.*[19] In that case, the plaintiff was injured when his metal chair collapsed. The carrier took possession of the chair for purposes of investigating a possible third-party action. Concluding that no such action would lie, the carrier returned the chair to the employer, and its identity was subsequently lost. The plaintiff wanted to bring his own third-party suit but could not locate the chair which, of course, was the evidence he needed to prove defectiveness. The court held that the compensation act did not bar an action based on failure to use reasonable care to preserve evidence, thus in effect destroying the plaintiff's third-party cause of action.

Pennsylvania has contributed still another, and perhaps more far-reaching, application of the dual-injury theme in *Reed v. Hartford Accident & Indemnity Co.*[20] The plaintiff had incurred a compensable injury and had made an agreement with the carrier calling for payment of total disability benefits. In October of 1969, the carrier stopped the payments but did not file a petition

18. 173 Cal. App. 2d 386, 343 P.2d 787 (2d Dist. 1959). *See also* Harris v. Tarlow, 33 Misc. 2d 933, 227 N.Y.S.2d 116 (1962), *rearg. denied*, 228 N.Y.S.2d 939 (1962), a case with a similar factual situation, but which was decided on a different theory. In that decision, the plaintiff was collaterally estopped by a decision of the compensation board from denying that the injury was within the purview of the compensation act.

19. 365 F. Supp. 277 (E.D. Pa. 1973).

20. 367 F. Supp. 134 (E.D. Pa. 1973).

to terminate or modify the agreement until June of 1971. In November of 1971, a hearing was held, at which time medical experts on both sides testified that the plaintiff was totally disabled. The plaintiff brought an action based on four charges: First, intentional imposition by the carrier of economic duress on the plaintiff in order to force a settlement for less than compensation for total disability; second, conversion of funds set aside for the benefit of the plaintiff; third, misuse and abuse of profits; and fourth, breach of the workmen's compensation agreement. The court held that the action for intentional wrongs and breach was not barred by the exclusive-remedy clause of the compensation act. An action has also been held to lie against an employer for the fraudulent misrepresentation made by a company physician who, although he was aware that the employee's hip had been broken, failed to reveal that fact in his medical report.[21]

There is, however, some authority to the contrary which bars actions based on fraud or misrepresentation. In *Greenwalt v. Goodyear Tire & Rubber Co.*,[22] the employer had promised to file the employee's complaint for him but had failed to do so. The employer made payments as if a claim had been filed but then suddenly stopped them. At that point the employee discovered that the claim had never been filed and he found his own claim rejected because it had been filed more than two years after the injury. The court said that the employer assumed, perhaps, a moral, but not a legal, obligation by promising to do something that the claimant could have done for himself. It should be noted that this distasteful decision is related to the extreme position taken by Ohio on the range of causes of action excluded by the act.[23]

In *Gay v. E.H. Moore, Inc.*,[24] the claimant apparently alleged that his employer's fraud in concealing his total disability led the employee to sign a settlement, as a result of which, he lost $8,000 in compensation benefits. The court ruled that the action would not lie. The correct remedy was held to be within the compensation system, by having the first award set aside and by proceeding to make a more correct award. The court did not dismiss the petition, but treated it as a petition to set aside the commission's order.[25]

21. Woodburn v. Standard Forgings Corp., 112 F.2d 271 (7th Cir. 1940). *Cf.* Ivanhoe v. Buda Co., 247 Ill. App. 336 (1928), 251 Ill. App. 192 (1929); 1 LARSON, *supra* note 8, § 13.21 nn.76-77 (listing cases which bar tort actions for aggravation of the injury by treatment).

22. 164 Ohio St. 1, 128 N.E.2d 116 (1955).

23. *See* text accompanying note 15 *supra.*

24. 26 F. Supp. 749 (D. Okla. 1939).

25. *See also* Ragsdale v. Watson, 201 F. Supp. 495 (W.D. Ark. 1962). In this

III. DEFAMATION

There appears to be only one case dealing with the question as to whether defamation comes within the exclusive-remedy provision; *Braman v. Walthall*[26] held that it does not. In that case, two store employees alleged that their employer's store superintendent had falsely called them "thieves," "cheats," and "lying thieves" in the presence of other store employees and of each other. The alleged result was not only damage to their reputations, embarrassment and mental anguish, but also physical illness. Judgments in favor of the employees in slander actions were sustained, as opposed to the employer's contention that the workmen's compensation board had exclusive jurisdiction. The court called the employer's argument novel and without authority, and observed that the compensation act had not repealed the statutes on libel and slander.

Here, as in the case of false imprisonment, the only element that introduces any possibility of serious controversy is the inclusion of physical injury as an element of damages. The same comment seems called for—the real gist of slander is not personal injury. To block the main thrust of the action because of this peripheral concept, when a compensation claim could not purport to give relief for the main wrong, would be incongruous and certainly outside the obvious intent of the exclusiveness clause. Since splitting the cause of action is frowned upon by the courts and would not be justified merely to put the personal injury item into the compensation stream, the cause of action belongs where its real essence lies, in the field of torts.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The exclusiveness clause has not been applied in the three reported decisions that have dealt with the tort of intentional infliction of emotional distress. However, the reasons for such have been quite different.

The first case was *Cohen v. Lion Products Co.*,[27] decided in a Federal District Court under Massachusetts law. The employer had notified the decedent that he was to be terminated in a month. Two weeks after termination, the decedent died from

decision, there were the added factors that the employee knew of the alleged fraud during the compensation hearing and that he failed to assert such or appeal the Commission's finding. *Cf.* Dunn v. Traveler's Ins. Co., 362 S.W.2d 412 (Tex. Civ. App. 1962).

26. 215 Ark. 582, 225 S.W.2d 342 (1949).

27. 177 F. Supp. 486 (D. Mass. 1959).

a heart attack. The estate sued the employer, alleging that death was the result of intentional infliction of emotional distress upon the decedent. The employer asked for summary judgment on grounds that the compensation act was the exclusive remedy.

The court first noted that Massachusetts would recognize the tort of intentional infliction of emotional distress. It then pointed out that the essence of that tort is the injury done to the feelings of the victim. Physical injury or disability are not essential ingredients of the tort. In this respect, the tort was compared to slander, libel, malicious prosecution and invasion of privacy which, as the court observed, had been held by the Massachusetts Supreme Court in a dictum in *In re Madden*[28] to be outside the exclusiveness ban.

It is evident from the court's opinion that it was aware of the complication inherent in the fact that the final result of the tort here was intensely physical. Indeed, in any quantitative sense the injured feelings of the decedent were insignificant compared with his physical death. The court's attempt to deal with this complication is not very convincing. It stated that the history, policy, scale of compensation and administrative mechanism of the act showed that it was concerned with bodily injury, apprehension of bodily injury and perhaps mental impairment, but not with injury to feelings or emotions apart from fright or its physical consequences. Here, the employer did not terrorize or frighten the decedent, but harassed him instead.

This opinion antedated the proliferation of compensation law on physical injury resulting from emotional causes. If the opinion were written today, it is unlikely that the distinction between fright and harassment would be attempted. Compensation awards for many kinds of emotional strain other than fright have become commonplace,[29] including awards for heart attacks brought on by arguments with superiors.[30] True, there are many denials in these cases also, but the grounds for the denial have usually been that the strain was not sufficiently unusual to be accidental, a factor irrelevant to the present issue.

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28. 222 Mass. 487, 111 N.E. 379 (1916). For a further discussion of this case, see note 2 *supra.*

29. *See, e.g.,* Schechter v. State Ins. Fund, 6 N.Y.2d 506, 160 N.E.2d 901 (1959), which involved sustained strain from unusually heavy litigation and resulted in a heart attack for one of the State Insurance Fund attorneys. *See also* 1A LARSON, *supra* note 8, § 38.65 nn.57.6-.20.

30. *See, e.g.,* Wilson v. Tippetts-Abott-McCarthy-Stratton, 22 App. Div. 2d 720, 253 N.Y.S.2d 149 (1964), involving a stroke brought on by an argument with a superior.

After this interesting attempt to grapple with a novel problem, however, the *Cohen* court granted the employer's motion for summary judgment on grounds that this type of cause of action did not survive the death of the injured person. Thus, the bulk of the opinion must be considered dictum, which is just as well, since the court's views on the exclusiveness issue seem to be erroneous. The reason is related to the comparable situation discussed earlier in connection with false imprisonment. First, one may note that if the act were an intentional wrong by a personal employer, as distinguished from an action of a supervisor, the tort suit might be allowed on grounds that the injury was not accidental. But if this solution does not apply as, for example, where the harassment by a manager is the result of his own impulse and not of any corporate policy or direction, one is again confronted with the problem of identifying the essence of the particular cause of action at stake.

The key to the answer is this: The essence cannot be derived solely from either the theoretical components of the tort or from the elements of damage. It must never be forgotten that the language of the compensation act begins with "injury" or "personal injury" or "death." The exclusiveness provision, moreover, draws no distinction between the kinds of tort actions which are barred. It does not bar merely those torts whose legal essence is physical injury. That being so, one has to start with the words "personal injury" and "death" and work back from there. Having set the "accident" issue to one side, one finds the other elements of coverage present in most of these cases: "Arising," "course" and "employment relation."

If the essence of the wrong, then, is personal injury or death, and if the usual conditions of coverage are satisfied, the action must be barred by the exclusiveness clause no matter what its name or technical form may be. Now that the compensability of a physical injury from an emotional stimulus is established, the problem can no longer be disposed of by saying that the particular tort normally acts only upon feelings rather than upon flesh.

The analysis can be tested by applying it to what might be thought of as two torts occupying the opposite extremes of the non-physical to physical calibration—defamation and assault. Defamation might seem to be about the last tort one would think of as competing with workmen's compensation, while assault is the tort involved in practically every case barred under the exclusive-remedy section.

However, suppose that the employee's foreman is impulsively berating him in the course of a work-connected argument. He calls him a cheat, a crook, a liar and an utter incompetent. As a result of the emotions produced by this colloquy, the employee has a heart attack and dies. The estate sues for damages for the death, alleging it was the result of the tort of slander. It seems self-evident that to allow the suit would be legally wrong under both the statute and the decisions on emotion-caused personal injury. Indeed, in those decided cases involving arguments with superiors, it is probable that slander could be found in most, and infliction of emotional distress in all. Practically, the consequences could be worrisome, with almost every emotion-based case turning up as some kind of tort suit.

One may use the tort of assault, for example, to test the conclusion that an element of damage must be considered one of the legal components of the tort. Here we are fortunate in having a case which makes precisely that point. In *Ritter v. Allied Chemical Corp.*,[31] the plaintiff brought suit against her employer for an assault by one of her superiors. She stated that the only result of the assault was a scratch on her hand and some soreness. She did not, however, claim any disability or other elements which might have provided compensation under the workmen's compensation laws of South Carolina. Because the injuries for which the plaintiff was suing were not those covered by the compensation act, the court held, on the defendant's motion for judgment on the pleadings, that the tort action against the employer was not barred.

This case is a reminder of the fact that, as every law student should know by his third week, the tort of assault does not require physical injury or even touching. Its minimal essence is putting the victim in fear of bodily harm. If bodily harm accompanies assault, as it usually does, the exclusiveness bar comes into play. If bodily harm does not accompany assault, the exclusiveness bar will not come into play. The conclusion must be that the test is not just the legal ingredients of assault, but also the results—specifically, whether physical injury of the kind dealt with by the compensation act is produced.

To summarize: 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 re-

31. 295 F. Supp. 1360 (D.S.C. 1968), *aff'd*, 407 F.2d 403 (5th Cir. 1969).

covery for physical injury or death, however, the action should be barred even if it can be cast in the form of a normally non-physical tort.

The second emotional-distress case to be considered is the 1972 decision of the California Supreme Court in *Unruh v. Truck Insurance Exchange*.[32] The plaintiff suffered a compensable injury to her back and underwent four surgical procedures. The defendant, her employer's compensation insurance carrier, hired Baker and Marino, two accident investigators, to conduct surveillance and determine the true extent of the plaintiff's disability. To this end, Baker befriended the plaintiff and took her to many social and recreational activities. At the same time, Marino covertly photographed them. In addition, the plaintiff alleged that she became emotionally interested in Baker. These motion pictures were shown at a hearing on the plaintiff's workmen's compensation claim and, as a result, the plaintiff alleged that she suffered a physical and mental breakdown which required hospitalization. A tort action was brought against the insurance carrier and the two investigators, alleging that the carrier had negligently failed to control the investigators, that assault and battery had been committed, that there was intentional infliction of emotional distress and that the defendants had conspired to commit all of these acts. In reaching its decision as to the propriety of the actions against the insurance carrier, the court reaffirmed prior decisions by holding that an insurance carrier performing its proper role in the compensation scheme shares the employer's immunity to suit by an injured employee. Therefore, the count alleging negligence on the part of the carrier was properly dismissed, since mere negligence did not remove the immunity. Similarly, the count alleging conspiracy to commit the acts, again based upon negligence, was properly dismissed. However, in dealing with the counts alleging assault and battery and intentional infliction of emotional distress, as well as conspiracy to commit these acts, the court held that even though an employer is immune to a tort action when it has committed intentional wrongs, the compensation carrier, under the dual-capacity doctrine, was not performing its proper role as a carrier in this case by embarking upon a deceitful course of conduct. Therefore, the causes of action just set forth were valid and not subject to dismissal.

For purposes of the point under analysis in this Article, the court's rationale is unfortunate because it does not confront the issue as to whether an intentional non-physical tort should be

32. 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

placed outside the reach of the exclusiveness provision. By relying principally on the dual-capacity doctrine, it has produced a holding that appears to apply only to insurance carriers and not to employers. It has also stretched out of all reasonable compass the otherwise useful and valid doctrine of dual capacity.

Before going into an investigation of what might have been a sounder rationale, it would be wise to indicate why the use of the dual-capacity doctrine was misconceived. This doctrine was given prominence in the California case of *Duprey v. Shane*.[33] In that case, a chiropractor who was the claimant's employer, was held suable as a third party when he attempted to treat an on-the-job injury and aggravated it. This was based on the fact that when he undertook the treatment, the employer assumed the doctor-patient relationship, and as the doctor, he was no longer entitled to the immunity from tort suit attaching to the status of an employer.

This dual-capacity doctrine has been applied to various other dual relationships to achieve the same end of piercing the employer's immunity, as for example, where the employer also has the persona and accompanying liabilities of a property owner,[34] truck owner[35] and shipowner.[36] The invocation of the doctrine here, however, is distinctly out of place. The court said, in effect,

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33. 39 Cal. 2d 781, 249 P.2d 8 (1952).

34. Marcus v. Green, 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973), holding that under the Illinois Structural Work Act, an employee may maintain a cause of action against his employer when the employer is also a part owner of the property where the injury occurred. The court stated that the "duty of an owner in charge of the work is entirely separate from the duty of an employer," and that the defendant was being sued not as "an employer" but as an "owner." *Id.* at 704, 300 N.E.2d at 517-18.

35. Costanzo v. Mackler, 34 Misc. 2d 188, 227 N.Y.S.2d 750 (1962), *aff'd, mem.*, 17 App. Div. 2d 948, 233 N.Y.S.2d 1016 (1962), holding that the co-employee immunity provisions in the compensation act do not apply to a defendant co-employee in his status as a truck owner.

36. Reed v. The Yaka, 373 U.S. 410. The Supreme Court in effect, applied the dual-capacity technique, without actually using dual-capacity language, to a shipowner whose second persona was that of a longshoring employer. The bareboat charterer of a ship (which for present purposes is the equivalent of a shipowner) hired longshoremen directly, instead of following the more common practice of engaging a stevedoring company to handle its loading and unloading. An injured longshoreman brought an action against his employer as the bareboat charterer of the vessel. The employer defended upon the exclusive-remedy provision in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 903 (1957). In holding the employer liable as a bareboat charterer for injuries arising out of the unseaworthiness of the chartered vessel, the Supreme Court stated:

> [O]nly blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic [the employer] was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid.

Id. at 415. The employer was also deemed liable for compensation benefits under the Longshoremen's Act.

that when the insurance carrier went beyond the bounds of its normal function of investigating compensation claims and committed an intentional tort, it stepped out of its "proper role" and became a "person other than the employer" for purposes of third-party liability. The California statute explicitly defines "employer" to include "insurer."[37] However, this identification was held forfeited when the insurer stepped outside the proper bounds of an investigation of the non-medical facts of the case.

California is among those states which have rejected attempts to hold the insurer liable as a third party, both as to negligent safety inspections[38] and as to negligence in medical care.[39] There was, therefore, no real basis in earlier case law on which to destroy insurer immunity, and so the dual-capacity *tour de force* was resorted to. The trouble with the present application is that it has none of the legal justifications of the other examples of dual capacity. The law is no stranger to dualism in status, but in every instance the second persona comes equipped with a special set of legal characteristics that operate whenever he acts in that capacity, whether he acts properly or improperly. A trustee is still a trustee even if he abuses his trust. A car-owner is still a car-owner and subject to owner's liabilities, whether his conduct is exemplary or vicious. To say that an insurer ceases to be an insurer when it does its job tortiously simply does not make sense. If it is not an insurance carrier at the time of the tort, what is it?

It is useful to reconstruct how *Unruh* could have reached the same result by applying the analysis favored in this Article rather than the ill-fitting dual-capacity fiction. The two main factors that could have been applied to get around the exclusiveness clause are: First, the fact that there were two distinct injuries rather than one; and second, that the dominant feature of the tort claim was not personal injury but intangible emotional damage.

As to the first factor, note that the tort here, unlike that in the emotional-distress case discussed earlier, did not produce the

37. CAL. LABOR CODE § 3852(b) (West 1971).

38. Burns v. State Comp. Ins. Fund, 265 Cal. App. 2d 98, 71 Cal. Rptr. 326 (1st Dist. 1968). It was determined that the State Fund was not subject to liability for alleged negligent inspections at a lumber mill. The Rating Bureau was held immune by virtue of CAL. INS. CODE § 11758 (West 1972), which rules out any civil liability for acts of the Bureau. The court concluded that the issue had recently been decided in State Compensation Ins. Fund v. Superior Court, 237 Cal. App. 2d 416, 46 Cal. Rptr. 891 (3rd Dist. 1965), involving substantially similar facts and issues.

39. Noe v. Travelers Ins. Co., 172 Cal. App. 2d 731, 342 P.2d 976 (1st Dist. 1959); Sarber v. Aetna Life Ins. Co., 23 F.2d 434 (9th Cir. 1928); Fitzpatrick v. Fidelity & Cas. Co. of New York, 7 Cal. 2d 230, 60 P.2d 276 (1936); Nelson v. Associated Idem. Co., 19 Cal. App. 2d 564, 66 P.2d 184 (2d Dist. 1937).

original compensable injury. It was separated from the original injury by a great length of time, and thus begins to resemble the fraud cases in which the fraud, committed days or years after the compensable injury, acted not upon that injury but upon other rights stemming from the injury.[40] More importantly, the second injury was not a mere aggravation of the first, but was utterly different in kind. The first injury was a back injury; the second injury was an emotional injury. To the extent that it had physical consequences, the second injury had nothing to do with an aggravation of the back condition. It consisted of a nervous breakdown of such severity as to require hospitalization.

The case is complicated at this juncture by the fact that the nervous breakdown had been treated by the compensation commission as an aggravation of the compensable injury. Additional compensation had been awarded and accepted, and the award had not been appealed. However, for purposes of focusing on the precise legal issue at stake here, one must accept the supreme court's holding on the effect of this award. The court's opinion stated that the plaintiff in her tort suit "did not seek damages for the initial industrial injury but for injuries subsequently occurring from entirely distinct events."[41] It also held that the award below was not res judicata as to the question of whether the second injury was merely an aggravation of the first. Unless this discussion is to proliferate into a series of discussions on res judicata and other such issues, one must accept the supreme court's holding on these items and move from there to the central issue under discussion.

If the second injury was not an aggravation of the first, but was a "distinct event," how is the plain language of the coverage clause to be satisfied? The California statute applies only to an injury "arising out of and in the course of the employment."[42] More pointedly, the same section requires as one of the conditions of coverage that "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."[43]

The injury in this instance consisted of a series of deceptions over a period of time—insinuation of an investigator into the claimant's affections, trips to Disneyland where the investigator would shake the rope on barrel bridges while the claimant crossed

40. *See* text accompanying notes 16-24 *supra.*
41. 7 Cal. 3d 616, 637, 498 P.2d 1063, 1078, 102 Cal. Rptr. 815, 830 (1972).
42. CAL. LABOR CODE § 3600 (West 1971).
43. *Id.* § 3600(b).

them as the photographer secretly filmed the claimant's physical handling of the situation and various other social, recreational and personal events. By no stretch of language can this be called the performance by the claimant of service growing out of and incidental to the employment "at the time of the injury."

To say that the second injury was only an aggravation or extension of the first because the investigation was related to the first injury, one would have to accept a type of but-for theory that could lead to preposterous results. It is true that but for the original injury, the investigation would never have been undertaken and the second injury would not have occurred. However, must one go on to say that the carrier acquires complete tort immunity for anything its agents do to carry out their investigation? Suppose the agent had decided to burglarize the claimant's house to obtain needed evidence. Suppose the claimant died of fright on seeing the burglar. Is the compensation act the exclusive remedy merely because the activity involved, collecting evidence, was in the mainstream of the agent's duties?

Again, suppose a claimant has a compensable broken toe and is being followed by a photographer. The claimant sees him in the bushes, a scuffle ensues and the claimant receives a skull fracture as a result of a blow from the camera. Is this skull fracture nothing but an aggravation of the broken toe?

The more serious question is the one discussed earlier: Was the injury involved in the tort suit essentially a personal injury of the kind covered by workmen's compensation? Here, as in some of the cases already analyzed, the issue is muddied somewhat by the fact that the claimant did indeed include a count for lost wages and medical expenses in her suit. Although the amount does not appear in the *Unruh* opinion, it was undoubtedly dwarfed by the other damages claimed—$500,000 general damages and $2,000,000 punitive damages. The importance of the wage and medical count is sharply diminished by the fact that most of these items had already been paid in the compensation case and, according to the court, would have to be set off in any tort recovery.

The claimant's lawyers might have strengthened their legal position on the key issue of exclusiveness by leaving the wage and medical item out of their complaint. For our purposes, let us suppose that this item had been omitted. Now one would have a stark presentation of the real question: How can a compensation act, which deals only in personal injuries, exclude a tort action that is not concerned at all with personal injuries, but only with

emotional distress? Suppose the investigator in *Unruh* had slandered the claimant on one of their dates, shouting to a roomful of people in a night club that the claimant was a bank robber, a murderer or a prostitute. Could an action for slander, asking damages only for injury to reputation, have been defeated on grounds that the incident grew out of an investigation of a compensation claim, and would not have happened but for the compensable injury? Suppose the investigator had locked the claimant in a small room to take pictures showing whether she could climb out a transom. In addition, suppose the claimant sued for damages only for the deprivation of personal freedom. Could this be blocked by the defense that the compensation remedy was exclusive? The questions answer themselves. Plainly the existence of a compensation claim does not give insurers or employers a blanket exemption from the entire law of tort.

The words "or employers" in the last sentence leads to the final comment on *Unruh*. A major advantage of using the present rationale, rather than the dual-capacity doctrine, is that the resulting rules apply to the employer just as much as to the insurer. After all, whether the employer is a self-insurer or not, the employer may quite possibly have occasion to engage in all the kinds of abuses of investigative activity here discussed, whether actual or hypothetical. Suppose that a set of facts indistinguishable from those in *Unruh*, except that the defendant was the employer, reached the California Supreme Court. It seems inconceivable that there would be a different result. Perhaps the court might try to say that the employer, like the insurer, became a different legal person when he misbehaved. However, this would so clearly expose the ficticiousness of the dual-capacity approach in this context that the concept could not possibly be used. Fortunately, there is a better approach, and the court has a good start toward it in the case of *Ramey v. General Petroleum Corp.*[44] *Ramey* and *Unruh* have two essential features in common: The second injury was distinct from the first, and the second injury was essentially not for personal injury. Once it is concluded that both of these things can be said (although saying them in *Unruh*, as we have seen, was not as easy as in *Ramey*), the legal conclusion follows: The separate and non-personal-injury tort is not barred by the personal-injury remedies provided in the compensation act.

The third mental-distress case is *Stafford v. Westchester Fire*

44. 173 Cal. App. 2d 386, 343 P.2d 787 (2d Dist. 1959).

Insurance Co. of New York, Inc.,[45] decided by the Supreme Court of Alaska in 1974. The claimant asked, among other things, for damages for conscious infliction of mental injury by the insurance carrier. He alleged that the carrier, through its agents, wilfully, deliberately and maliciously withheld compensation benefits in an effort to discourage him from proceeding and securing compensation under the act. The trial court granted summary judgment for the defendant on this point, chiefly on grounds that since the act contained a specific penalty for delay in making compensation payments, the penalty was the exclusive remedy. The supreme court reversed and remanded the case for trial on this point.

Since the case arose on summary judgment, the legal issue was presented in a rather abstract form. The opinion reveals nothing as to what form the mental injury took, nor what actual damage flowed from the mental distress. The court adopted the reasoning of *Unruh*, and drew a distinction between the normal conduct of an investigation, in which immunity would apply, and intentional torts in connection with the investigation and payment claims.

Stafford is, in this purely legal sense, a relatively uncomplicated example of the category of cases here analyzed. Under the analysis here favored, it would be unnecessary to adopt the dual-capacity approach of *Unruh*. The dualism is sufficiently supplied by the fact that the misconduct in the course of investigation and payment was separate in time and nature from the original physical injury. Moreover, the nature of the damage, mental injury, is presumably quite distinct from the physical injury for which compensation was payable. It only remained to be added that the penalty provision for late payments was not to be construed as intending that the penalty was the exclusive remedy for any tortious conduct involving late payment. The carrier here, said the court, was alleged to have done more than merely delay payments; it was asserted that the carrier "intentionally and maliciously misled him about his right to compensation and discouraged him from exercising his rights, resulting in emotional injury."[46] The court cited *Flamm v. Bethlehem Steel Co.*,[47] a case where the carrier and employer were alleged to have conspired to deprive a longshoreman of his compensation by submission of a fraudulent medical report, as an analogous example of a tort committed in the course of processing a claim.

45. 526 P.2d 37 (Alas. 1974).
46. *Id.* at 44.
47. 18 Misc. 2d 154, 185 N.Y.S.2d 136 (1959), *aff'd mem.*, 10 App. Div. 2d 881, 202 N.Y.S.2d 222 (1960).

V. EMPLOYER'S NEGLIGENT NON-DISCLOSURE OF NON-COMPENSABLE DISEASE

When the employer's fault takes the form of negligence in not disclosing to the employee the existence of a noncompensable disease discovered in the course of an examination in the company clinic, most cases will allow a tort action based on the theory that the injury is in no sense work-connected.[48]

There are principally two issues here: The tort issue of whether by voluntarily undertaking such an examination, the employer acquires a duty to reveal its results to the employee; and the compensation issue of whether such an action is barred by the exclusive remedy clause.

As to the tort issue, there seems to be general agreement that the employer is under such a duty if the employer had knowledge of the condition and of its dangerous or potentially dangerous character, and if the employee was himself unaware of the disease or condition.[49]

As to the compensation issue, the majority view is consistent

48. The following is a listing of the leading cases in those jurisdictions supporting this doctrine:
Federal: Reid v. United States, 224 F.2d 102 (5th Cir. 1955). The plaintiff alleged that the employer negligently omitted to reveal symptons of tuberculosis. After a claim for compensation under the Federal Employees' Compensation Act was denied, the court held that an action under the Federal Tort Claims Act was stated. *But cf.* Tourville v. United Aircraft Corp., 262 F.2d 570 (2d Cir. 1959). That court applied the Connecticut Workmen's Compensation Act and barred an action based upon a worsening of a nonwork-connected disease, even though the employer failed to warn the employee of tuberculosis symptoms revealed by X-rays taken at the company clinic.
New York: Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (1959). The plaintiff's employer had taken chest X-rays but failed to tell him that they revealed tuberculosis. The plaintiff and his wife brought a suit based on the alleged negligence of the employer in failing to make this disclosure. However, neither party maintained that the disease was connected with the employment. The court held that the action was not barred, citing cases concerned with diseases not covered by the act as well as cases involving wilful assault by the employer.
Washington: Riste v. General Elec. Co., 47 Wash. 2d 680, 289 P.2d 338 (1955).

49. The following is a listing of the leading cases in those jurisdictions supporting this doctrine:
Maine: Glidden v. Bath Iron Works Corp., 143 Me. 24, 54 A.2d 528 (1947); Annot., 175 A.L.R. 976 (1947).
Mississippi: Blue Bell Globe Mfg. Co. v. Lewis, 200 Miss. 685, 27 So. 2d 900 (1946).
New Jersey: E.I. Du Pont de Nemours & Co. v. Brown, 102 F.2d 786 (3d Cir. 1939), applying New Jersey law.
New York: Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (1959). For a further discussion, see note 48 *supra*.
Oklahoma: Atchison, T. & S.F. Ry. v. Perryman, 200 Okla. 266, 192 P.2d 670 (1948).
Tennessee: Union Carbide & Carbon Corp. v. Stapleton, 237 F.2d 229 (6th Cir. 1956) (applying Tennessee law); Annot., 69 A.L.R.2d 1206 (1956).

with the analysis put forward in this Article. The test here looks entirely to the injury rather than to the components of the tort. If the nature of the tort controlled, it would be clearly barred since it consisted of simple negligence, and since the time and place of the negligence were within the bounds of the employment.[50] But the injury itself was by definition non-work-connected, and this is in itself sufficient to take the matter out of the exclusiveness bar. If this were not so, we might have the spectacle of an admitted tort without a remedy. This factor was clearly present in the *Reid v. United States* decision,[51] in which compensation had already been denied.

However, when the employer's participation in the episode goes beyond mere examination and extends to some kind of active conduct or attempted treatment by the employer or his employees aggravating the noncompensable condition, this has usually been held to be sufficient to endow the matter with compensable character and hence bar a damage suit.[52]

VI. RETALIATORY DISCHARGE

In *Frampton v. Central Indiana Gas Co.*[53] the Supreme Court of Indiana has provided the first judicial decision where the discharge of an employee in retaliation for filing a workmen's compensation claim is actionable at law and which may support an award of both actual and punitive damages. It is odd that it has taken so long for such a decision to be reached. Perhaps the ex-

50. This was the very theory relied upon in Tourville v. United Aircraft Corp., 262 F.2d 570 (2d Cir. 1959). For a further discussion of this case, see note 48 *supra*. The *Reid* court concluded that the failure to carefully inspect the plates and warn the employee constituted repetitive acts sufficiently locating the incident within the time and place boundaries of the employment.

51. 224 F.2d 102 (5th Cir. 1955). For a fuller discussion of this case, see note 48 *supra*.

52. *See, e.g.*, Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479, 161 A.2d 479 (1960), *rev'g* 48 N.J. Super. 457, 138 A.2d 53 (1958). This case involved the failure of an employer to furnish medical aid, after promising to do so, for a non-occupational illness culminating in a heart attack. The court recognized that the employer's conduct constituted negligence and determined that the negligent conduct arose out of the employment. The compensation remedy was therefore deemed exclusive. *See also* 1 LARSON, *supra* note 8, § 13.21.

For a case simply involving failure on the part of the employer to furnish medical care, see Davis v. Drilling & Exploration Co., 3 Cal. Rptr. 681 (2d Dist. 1960), *rehearing granted*, (unpublished). For a fuller discussion of this case, see note 4 *supra*. *See also* Paradissis v. Royal Indem. Co., 496 S.W.2d 146 (Tex. Civ. App. 1973). The plaintiff was an injured employee who brought an action alleging negligence and breach of the workmen's compensation insurer's contract of insurance. His complaint was based on the theory that the employer had concealed the fact that the employee needed psychiatric care. The suit also alleged a cause of action for failing to provide such care. The court determined that the employee's only remedies were under the Texas Workmen's Compensation Act.

53. 297 N.E.2d 425 (Ind. 1973).

planation may lie in the fact that the conduct involved is so contemptible that few modern employers would be willing to risk the opprobrium of being found in such a posture. However, there have been several earlier cases where, for one reason or another, an action for such retaliatory discharge had failed.[54] Before discussing the *Frampton* case in greater detail, perhaps it would be helpful to review these prior decisions.

Two Missouri decisions in this category, *Christy v. Petrus*[55] and *Narens v. Campbell Sixty-Six Express*,[56] can be partly explained by the existence of a criminal penalty addressed to such retaliation. This enabled those courts to hold that the express provision of a criminal penalty implied the exclusion of all civil remedies. The courts also relied on the argument that since the employment was at will, the employee was subject to discharge at any time without cause.[57] It should be noted, however, that even this truism is no longer reliable. For example, in *Monge v. Beebe Rubber Co.*,[58] the Supreme Court of New Hampshire held that:

> [A] termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.[59]

In that decision, a female worker alleged that she had been harassed by her foreman because she refused to be "nice" to him and go out with him. She collapsed at work and was taken to the hospital where she remained for four days. She was subsequently fired for failure to report to work for a period of three days. The court cited the *Frampton* case and commented on the changing legal, social and economic conditions which have governed the relationship between employer and employee.[60]

Returning to the *Frampton* decision, the plaintiff in that case had injured her arm while working and received compensation

54. *See, e.g.*, Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956); Narens v. Campbell Sixty-Six Express, Inc., 347 S.W.2d 204 (Mo. 1961); Raley v. Darling Shop of Greenville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950).
55. 365 Mo. 1187, 295 S.W.2d 122 (1956).
56. 347 S.W.2d 204 (Mo. 1961).
57. *Id.* at 206; Christy v. Petrus, 365 Mo. 1187, 1189, 295 S.W.2d 122, 124; *see* Raley v. Darling Ship of Greenville, Inc., 216 S.C. 536, 538-39, 59 S.E.2d 148, 149 (1950). *See also* Lester v. County of Terry, 353 F. Supp. 170 (N.D. Tex. 1973), where a worker's attempt to make a claim against a county for retaliatory discharge was dismissed on the grounds of governmental immunity. A Texas statute which prohibited discharge of a person who had filed a compensation claim was held inapplicable, since acceptance of compensation coverage was optional for a county and the county involved had not chosen to be so covered.
58. 316 A.2d 549 (N.H. 1974).
59. *Id.* at 551.
60. *Id.*

and medical benefits during the four months she was off the job. Nineteen months after the injury, she became aware that she had a possible claim for thirty percent loss of the use of her arm. With some trepidation, she made a claim and received a settlement. A month later, however, she was fired without reason although she had been performing her job capably. She brought an action for $45,000 in actual damages and $135,000 in punitive damages. The Indiana Supreme Court reversed an order of dismissal from the lower court and remanded the case for trial.[61]

Since the court had literally no direct authority to rely on, it based its decision on broad principles and analogies. The central principle stressed by the *Frampton* court was the fact that workmen's compensation acts express a strong public policy that compensation should be available to injured workers.[62] However, if an employer could with impunity coerce an employee into foregoing his rights, the employer could unilaterally defy and destroy the function of such acts and at the same time relieve himself of an obligation deliberately imposed on him by the legislature. In reaching its decision, the court relied on the following language from the Indiana Workmen's Compensation Act:

> No contract or agreement, written or implied, no rule, regulation or *other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act.[63]

The court viewed the threat of discharge as a "device" under this clause.[64]

As a cogent analogy, the *Frampton* court relied on cases involving retaliatory eviction of tenants for reporting health and safety code violations.[65] These cases have not only held that proof of a retaliatory motive is a defense to eviction under a summary eviction statute,[66] but also that such retaliation will give rise to an action for damages for the eviction and for intentional infliction of emotional distress.[67]

Frampton acknowledged the common-law rule that under ordinary conditions, an employee at will may be fired without cause,

61. 297 N.E.2d 425, 428-29 (Ind. 1973).
62. *Id.* at 427.
63. *Id.* at 429-30. *See* IND. ANN. STAT. § 40-1215 (1965).
64. 297 N.E.2d 425, 428 (Ind. 1973). For a contrary view, see Greenwood v. Atchison, T. & S.F. Ry. Co., 129 F. Supp. 105 (S.D. Cal. 1955).
65. *See* cases listed in 297 N.E.2d 425, 428 n.4 (Ind. 1973).
66. *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (the leading decision in this area); *see also* the cases listed in the *Frampton* opinion. 297 N.E.2d 425, 428 n.4 (Ind. 1973).
67. *See, e.g.*, Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1st Dist. 1971).

but concluded that "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule must be recognized."[68] This generalization is obviously a principle of prime importance not only in workmen's compensation but in a wide variety of fields. It is true that specific anti-retaliation clauses are increasingly common in modern legislation, such as civil rights and fair employment acts. However, in the absence of such clauses, the *Frampton* doctrine can serve to anticipate and forestall a particularly repellent, if rare, type of employer misconduct.[69]

VII. CONCLUSION

The central principle that actions based on independent intentional nonphysical torts commited by carriers or employers should not be barred by the exclusiveness provision is clearly sound and desirable. One senses, however, some faint and worrisome warning signals in the Alaska case of *Stafford*. It would be unfortunate if claimants were to begin to assert routinely that carriers had maliciously inflicted mental injury on them whenever the carrier does anything other than pay up fully and promptly. Courts will do well to scrutinize such claims with care, to ensure that the gravity of the tortious conduct and its consequences are serious enough to bring the case within the purpose and reasoning of the legitimate successful recoveries that built up and justified the general rule favoring liability in this class of cases.

68. 297 N.E.2d 425, 428 (Ind. 1973).

69. For a thorough analysis of other possible analogies supporting the *Frampton* result, see Lambert, *Workmen's Compensation*, 35 A.T.L.A. L.J. 152 (1974). *See also* L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir. 1968). In that decision a malpractice insurer had an unqualified cancellation provision with which it had fully complied. However, its motivation for correlation of the plaintiff was retaliation against him for testifying in a malpractice suit against a fellow dentist insured by the same carrier. The court concluded that the attempt to intimidate a witness was a corruption of the judicial process. Therefore, the otherwise-unqualified right to cancel was limited by public policy and the cancellation was voided.