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INTRODUCTION

In the recent case of *Unruh v. Truck Insurance Exchange*,[1] the California Supreme Court held that a Workmen's Compensation carrier is liable for damages to an injured employee for its intentional torts committed during investigation of the accident.

This article will discuss the significance and effect of this case of first impression. Previously carriers had been immune to suit under these circumstances.

FACTS

Orpha Unruh, a 45 year old supermarket bookkeeper, injured her back on March 31, 1960, while picking up a bag of coins. Subsequently, the doctors provided by the Workmen's Compensation carrier operated on her back on four different occasions. During the first operation, a sponge was left in the patient's back and a malpractice suit ensued. Overmedication caused addiction to narcot-

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1. Unruh v. Truck Ins. Exch., 7 Cal.3d 616, 498 P.2d 1063, 102 Cal.Rptr. 815.

ics. The fusion did not take and the patient required psychiatric care.

In 1963, the plaintiff filed an application for a permanent disability rating with the then Industrial Accident Commission of the State of California. The compensation carrier doubted the genuineness of the claimed disability and hired an investigator to take motion pictures of the applicant. The investigator reported that Mrs. Unruh stayed in her apartment and did not come outdoors. Movies could not be taken. The carrier then changed tactics. It hired a handsome investigator who wined and dined the applicant and expressed a personal interest in her. This in turn excited an emotional response from the applicant. The investigator took Mrs. Unruh's hand and led her off to Disneyland. An accomplice armed with a camera having a telescopic lens photographed Mrs. Unruh gingerly paddling an Indian canoe and carefully walking across a rope and barrel bridge which the investigator shook furiously. Mrs. Unruh was examined the following day by defendant's doctor who later saw the movies and concluded the claimant was faking.

At a hearing before the Industrial Accident Commission, Mrs. Unruh frankly admitted to all of the activities in question before she was informed that movies had been taken or would be shown. Upon seeing the movies, she felt betrayed and thereafter became psychotic. She required over a year and a half of hospitalization which resulted in medical bills of $128,000. Orpha Unruh recovered workmen's compensation benefits for the psychiatric disturbance on the theory that the injury was incidental to the compensation case.

She also filed a civil suit against the workmen's compensation carrier, the supervisor of claims and the investigator. The issues before the court were whether immunity from suit extends to a compensation carrier's acts against an applicant and if the applicant should be given a civil remedy. The trial court sustained a demurrer to the complaint based on lack of jurisdiction on the theory that the Workmen's Compensation Appeals Board had exclusive jurisdiction and that the plaintiff was entitled to no more than compensation benefits. Mrs. Unruh appealed.

The concepts with which the court was concerned were jurisdiction, negligent and intentional torts, wrong without a remedy,

medical as distinguished from non-medical investigation of claims, double recovery, election of remedies, res judicata and setoff. The tools with which the court worked included provisions of the California Labor Code, public policy, a repugnant reaction to outrageous conduct, the status concept in California law and the fiction of dual capacity. As a matter of public policy, an insurance carrier should not be allowed to further injure compensation applicants who are already injured. The problem the court faced therefore was how to create a remedy which would not subject "the system of Workmen's Compensation . . . to a process of partial disintegration".[2]

Also to be considered was the fact that the misrepresentation by the investigator as to the interest he represents in an attempt to secure information has been held to be dishonesty and fraud in violation of statute.[3] To say that the carrier could intentionally, deliberately and illegally destroy the mentality of a disabled employee with impunity is shocking. What could happen if the carrier had immunity from penalty for such an injury? Some workmen's compensation cases require rather substantial reserves up to $300,000 or more. Death benefits are comparatively small. The overzealous investigator for the Workmen's Compensation carrier might accidentally convert a case of great magnitude into one of lesser liability if not held to account.

The real problem in *Unruh* was to find a solution which would satisfy the interests of the injured employee, hold the carrier to its responsibilities, and yet not destroy the integrity of the compensation system.

History

In a similar factual situation the Florida District Court of Appeal held that an insurance company investigation could be an invasion of privacy.[4] The plaintiff in that case brought an action for personal injuries against the defendant following an automobile accident. The attorney for the defendant employed a private investigator to conduct a surveillance of the activities of the plaintiff, which included the taking of motion pictures. The purpose of

2. Noe v. Travelers Ins. Co., 172 Cal. App. 2d 731, 737, 342 P.2d 976, 979 (1959).

3. Cal. Bus. & Prof. Code, §§ 7551(e) & 7553.2 (West 19—); Cal. Ins. Code, §§ 790.01, 790.02 & 790.03 (West 19—); Wayne v. Bureau of Pvt. Investigators and Adjusters, Dept. of Prof. & Voc. Stds., 201 Cal. App. 2d 427, 20 Cal. Rptr. 194 (1962); Taylor v. Bureau of Pvt. Investigators & Adjusters of Calif., 128 Cal. App. 2d 219, 275 P.2d 579 (1954).

4. Tucker v. American Empl. Ins. Co., 171 So. 2d 437, 13 A.L.R.2d 1020 (Fla. 1965).

the sub rosa investigation was to discover if there was any inconsistency between the injuries which the plaintiff alleged and her actual physical activity. The plaintiff then filed a complaint alleging that the defendant wilfully and maliciously caused the plaintiff to be "openly followed and shadowed" in such a manner as to make the plaintiff and the general public aware that she was being followed which caused her to suffer certain injuries. The defendant filed a motion for summary judgment which was denied. The Court stated:

> The question of whether the investigation of a claimant in a personal injury case can give rise to this tort has not been answered in Florida. In considering this question it must be borne in mind that it is not uncommon for defendants to investigate the plaintiffs in order to determine the validity of a claim in a personal injury case. Because of the public interest in exposing fraudulent claims, a plaintiff must expect that a reasonable investigation will be made subsequent to the filing of claim. However, there should be certain limits as to how the investigation is conducted, because *there is also a social utility in not permitting a defendant to harass or intimidate a plaintiff into settling a claim on less favorable terms than those which he would voluntarily accept.* (Emphasis added.)[5]

An attempt to shadow the plaintiff by snooping around her house, peeping in her windows, calling at her door under the guise of being a television salesman and following her closely in public places was held in Georgia to constitute an actionable invasion of her right of privacy.[6] The Court said that just because the plaintiff filed a suit against the defendant's employer for personal injuries the defendant had no right to investigate the plaintiff in an unreasonably obtrusive manner which would disturb the sensibilities of a person with normal reactions.

Allegations that two of the defendant's detectives constantly watched the plaintiff with binoculars, trespassed upon her property and peeped into the windows of her home were held in Louisiana to be sufficient to constitute a cause of action for an invasion of her right of privacy.[7] The court pointed out that the plaintiff filed a Workmen's Compensation claim against an insurance company and observed that such company had the right to hire inves-

5. *Id.* at 438.
6. Pinkerton Nat. Det. Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119, 13 A.L.R.3d 1026 (1963).
7. Souder v. Pendleton Dets., Inc., 88 So. 2d 716 (L.A. App. 1956).

tigators to determine the validity of the claim *as long as the investigation was conducted in a legal manner.* The Court held that, since it appeared that the detectives violated a "peeping tom" statute, the investigation was not conducted within authorized legal bounds and the defendant was subject to a suit for civil damages.

The California Attitude

In a series of California cases, the courts have reviewed the status of insurance companies and their duties to the insured and the beneficiaries of insurance policies. In *Crisci v. Security Insurance Co.*[8] the California Supreme Court recognized that an insurer owes to its insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy. In *Fletcher v. Western National Life Insurance Company* the court held: "We think that, similarly the implied in law duty of good faith and fair dealing imposes upon a disability insurer the duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him of the benefits of the policy."[9] It was held in *Barrera v. State Farm Mutual Automobile Insurance Company*[10] that an automobile liability insurer cannot, after an automobile accident injuring a member of the public, investigate the insurability of its insured, and, finding uninsurability, then deny coverage. The duty to the injured plaintiff was found to have arisen out of the new "status" approach to insurance policies. The duty does not arise from contract. "There is a clear judicial trend toward treating insurance policies more like 'commodities' than 'contracts' and toward imposing extracontractual obligations on insurers on the basis of the expections of those with whom they deal and the 'public service' nature of the function they perform."[11]

In *Unruh v. Truck Insurance Exchange*[12] the question posed was whether the commission of negligent and intentional torts during the investigation of a claim put the carrier beyond its proper role as insurer into a different status unprotected by immunity.

It is true that compensation insurance carriers have the duty to defend the employer and the right to conduct proper investigations

8. Crisci v. Security Ins. Co. of New Haven, Conn., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

9. Fletcher v. Western Nat. Life Ins. Co., 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (1970).

10. Barrera v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969).

11. Rintala, *The Supreme Court of California in 1968-1969*, 58 Cal. L. Rev. 80, 93 (1970).

12. 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

to that end, but they do not have the right to use excessive means, which fall within the area of outrageous conduct.[13]

The Supreme Court in *Redner v. Workmen's Compensation Appeals Board*[14] found similar investigational tactics by the insurance carrier to be "reprehensible" and held that motion pictures taken during such an investigation were inadmissible at the Appeals Board proceedings. Whether the compensation carrier could be treated as a third-party was not at issue.

THE WORKMEN'S COMPENSATION ACT

Before the Workmen's Compensation Act (the Roseberry Act)[15] was passed in 1917, an employee injured on the job had the right to sue his employer for negligence. The employer had available the defenses of contributory negligence, assumption of risk and the negligence of a fellow employee, all of which barred recovery. Proof of the plaintiff's claim was difficult and few cases were successful. The financial consequence of injury to employees was devastating, often causing families of the injured worker to rely on public relief.

The legislature sought to solve this socio-economic problem. A no-fault principle was adopted with lack of proximate cause the only real defense. Administration of industrial injury claims was assigned to a commission which was designed to work quickly and with a minimum of cost to the parties. Benefits included medical treatment and support payments adequate to keep the employee and his family off public dole during the period of cure and rehabilitation.

The substantive roles in the Workmen's Compensation scheme are the injured employee-applicant, the employer-defendant, the employer's compensation insurance carrier, and the treating doctor. The employee is the beneficiary of the Workmen's Compensation Act; his welfare was the concern of the legislature. The employee is the workman, usually with a dependent family, whose income is interrupted by injury during the course of his employ-

13. Fletcher v. Western Nat. Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).
14. Redner v. Workmen's Comp. App. Bd., 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971).
15. CAL. LAB. CODE §§ 3201 *et seq.* (West 1971).

ment. The employer pays the premium to the insurance carrier. Immediately upon being notified of an injury, the employer reports the facts to the State of California and the insurance carrier. The carrier authorizes medical treatment at its expense and pays temporary disability until the condition becomes permanent and stationary. The employee then settles his claim with the carrier, subject to approval by the Workmen's Compensation Appeals Board, or the employee receives a permanent disability award through litigation at the Workmen's Compensation Appeals Board. The award is payable semiweekly until fully paid. In proper cases it may be paid in a lump sum. Cases in which there is disability over 70% are given a lifetime pension. A lifetime medical award is granted where indicated. It is not uncommon for serious cases to involve substantial sums. The insurance carrier assumes all of the responsibilities of the employer and negotiates with the employee and defends the action.

The medical doctor occupies the fourth major role in the scheme. He is usually an independent contractor employed by the carrier to cure the patient. Not only does the physician treat the injured employee on behalf of the employer and the insurance carrier, but he evaluates the condition of the employee and his evaluation is the basis for an award at the Board. The physician usually bases his evaluation upon medical records, upon reports of other doctors who have seen the injured employee, and upon the patient's complaints and history given to the doctor during a physical examination conducted by him. In order to supply the doctor with additional relevant information, the compensation carrier often investigates the activities of the employee-applicant to verify the claimed disability. Motion pictures are sometimes taken which are exhibited to the examining doctor who may then find a basis for lowering the estimated disability rating. Applicants may be consciously or unconsciously freer in their movements when they are not aware of detection. When the thought of litigation is heavy upon the mind of an applicant while in the doctor's office, he may tend to emphasize his complaints because of their importance to the final outcome. Exaggeration may be voluntary or involuntary. Doctors apparently find that if they can distract the patient, the patient will, while unguarded, perform motions which are otherwise guarded either for fear of pain or voluntary concealment. This complicated picture of human behavior is further obscured by the element of motivation. The direct concern with financial gain is always involved and may affect, to some degree, the truth.

Investigators have found that they can obtain better sub rosa results if they completely distract the claimant by some device.

The boundaries of imagination have been the only limitation. Compensation investigators and private detectives have used every conceivable trick and device to entice, to entrap, and to "rope" the claimant into an onstage performance. Examples of roping are many, including the use of an ice pick to puncture the tire of an employee, claiming back injury, who is then photographed repairing the tire, squatting and lifting it in a manner inconsistent with his professed disability. "Private eyes" have rung door bells, dropped syrup in a bottle on the front porch causing the injured lady of the house to stoop and bend before the camera. A free brick patio with barbeque was offered one claimant as a neighborhood advertisement if he installed the patio himself.

Investigation techniques have been known to cause injury to the applicant. Many employees have told of injury in the doctor's office due to over-rigorous examination. These aggravations have been held to be compensable. In the event of a breach of duty by the employer, the carrier, or the doctor, there are various avenues of recourse open to the injured employee in California.

THE IMMUNITY QUESTION

The employer is granted complete statutory immunity for his tortious acts except for the exclusive remedy under the Workmen's Compensation law.[16] The employer's immunity is extended to the carrier by statute.[17] But section 3852 of the California Labor Code provides that all other persons may be liable to the injured employee for damages in civil actions. The doctor has no immunity and is liable for his tortious acts.[18]

When an injured party sits down with his attorney to discuss his legal rights, the attorney often advises the injured employee that Workmen's Compensation is all he can collect from the employer and the insurance carrier. However, the attorney will look for the elements of third party liability. This vast area of liability includes the treating doctor, the hospital, the product manufacturer and supplier, the general contractor, the sub-contractor, the engineer, governmental entities, owners and occupiers of land, and anyone else who commits a tortious act.

16. CAL. LAB. CODE § 3601 (West 1971).
17. CAL. LAB. CODE § 3850 (West 1971).
18. Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952).

Can a compensation carrier be a third party? The problem has arisen in the treatment cases. The compensation carrier commonly instructs a treating doctor to terminate treatment. This lay decision often negligently causes an aggravation of injuries and the employee wants to file suit against the carrier. California cases have held that a compensation carrier cannot be a third party because of the immunity statutes.[19] In *Fitzpatrick v. Fidelity and Casualty*[20] the injured employee was held to have a remedy against the physician for malpractice, but not against the carrier. The courts have stated that to hold the carrier liable for negligence, or conspiracy to deny treatment, would cause the compensation system to break down.[21]

Furthermore, the Workmen's Compensation Law provides adequate remedies to an injured employee when treatment is inadequate or is withheld. The employee has the right to obtain his own medical treatment and to seek reimbursement for the expense in proper proceedings before the Appeals Board. He can also ask for penalties. These remedies are adequate, and if properly exercised, the employee will not suffer from inadequate or wrongful treatment without recourse, either against the carrier or against the negligent doctor.[22]

Suits have been brought against the compensation carrier for injuries arising out of the carrier's negligent inspection of premises pursuant to contract between the carrier and the employer. The courts have held that safety inspections are beneficial to employees and should be encouraged as a matter of public policy, and that the role of the compensation carrier includes safety inspection. Therefore, as to the carrier's negligent acts of inspection, statutory immunity applied.[23]

The Dilemma in Unruh

In the *Unruh* case, the Supreme Court could have held that the investigational injury was non-industrial in the first place and that there was no remedy under the Workmen's Compensation

19. Cal. Lab. Code §§ 3861 & 3850 (West 1971).
20. Fitzpatrick v. Fidelity and Cos. Co. of N.Y., 7 Cal. 2d 230, 60 P.2d 276 (1936); *see also,* Heaton v. Kerlan, 27 Cal. 2d 716, 166 P.2d 857 (1946); Dodds v. Stellar, 30 Cal. 2d 496 ,183 P.2d 658 (1947).
21. Noe v. Travelers Ins. Co., 172 Cal. App. 2d 731, 342 P.2d 976 (1959).
22. Hazelwerdt v. Industrial Ind. Exch., 157 Cal. App. 2d 759, 321 P.2d 831 (1958); Cal. Lab. Code § 4800.
23. State Comp. Ins. Fund v. Superior Ct. for Cnty. of Siskiyou, 237 Cal. App. 2d 416, 46 Cal. Rptr. 891 (1965); Burns v. State Comp. Ins. Fund, 265 Cal. App. 2d 98, 71 Cal. Rptr. 326 (1968).

law.[24] After all, the injury complained of occurred in April of 1964, whereas the original injury was in March of 1960. The injured party was not an employee at the time of her 1964 injury. She had not been employed in the interval. It was alleged that the injuries complained of took place at Disneyland and at the Industrial Accident Commission in Long Beach, California, far removed from her place of original employment in Sun Valley, California. Many cases have held post-accident aggravations connected with the processing of industrial claims are compensable, and it is desirable that they should be since benefits under the Workmen's Compensation Law are usually quickly provided. As a practical matter, the Industrial Accident Commission had already found Mrs. Unruh's psychiatric injury to be industrial and she received an award of compensation and medical benefits in excess of $200,000. If the Supreme Court now held that the aggravation injury was noncompensable under the Workmen's Compensation Law in order to create a third party liability remedy, Mrs. Unruh would face the horrible possibility that she would have to reimburse the compensation carrier the benefits mistakenly paid under the Workmen's Compensation Law should she lose her tort action against the carrier. This would be a debt in excess of $200,000.

It becomes obvious that a distinction between negligent torts and intentional torts would be productive. If the carrier were ex-

24. CAL. LAB. CODE § 3600 provides as follows:
Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in § 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 casues death, in those cases where the following conditions of compensation concur:
(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.
CAL. LAB. CODE, § 3602 provides as follows:
In all cases where the conditions of compensation do not concur, the liability of the employer is the same as if this division had not been enacted.

tended immunity only for its negligent acts, consistent with the treatment and inspection cases, the Appeals Board would have exclusive jurisdiction to award benefits; the objective of the legislature would be fulfilled and the uniform and exclusive application of the law would not become honeycombed with independent and conflicting rules of the court as feared in *Noe v. Travelers Insurance Company.*[25] This would also avoid the specter of flooding the courts with injury cases arising out of the handling of compensation matters.

But by what device could the court hold that the plaintiff had a cause of action that would afford her adequate relief for the intentional tort, one to which the carrier was not immune, one which would be consistent with her right to immediate benefits at the Appeals Board and one which would be consistent with the previous cases in the medical and inspection areas? It was stated by the court that excessive, outrageous conduct, which is not necessary to protect the interests of the insurance industry, is conduct outside of the role of the insurer under any concept.[26]

The Solution

The answer is found in the fiction of dual capacity. This device was created by the late Justice Peters in the case of *Duprey v. Shane.*[27] In *Duprey* the plaintiff, a nurse, sustained an industrial injury while in the employ of the defendant, a chiropractor. He undertook to treat the plaintiff for the injury and in so doing aggravated it. Like Mrs. Unruh, the plaintiff sought and received workmen's compensation benefits from the Board for the original injury and also its aggravation. Thereafter, she brought an action seeking damages for malpractice against her chiropractor-employer. The court reasoned that "The employer-doctor is a 'person other than the employer' within the meaning of section 3852 of the Labor Code. . . . In treating the injury, Dr. Shane did not do so because of the employer-employee relationship, but did so as an attending doctor, and his relationship to . . . (the plaintiff) was that of doctor and patient."[28] Duprey was allowed to file application for adjudication of claim at the Industrial Accident Commission and also to sue in the civil courts for negligence. Presumably a setoff precluded double recovery.

In *Unruh* the insurance carrier was, according to the complaint,

25. 172 Cal. App. 2d 731, 342 P.2d 976 (1959).
26. 7 Cal. 3d 616, 630, 498 P.2d 1063, 1073, 102 Cal. Rptr. 815, 825.
27. 39 Cal. 2d 781, 249 P.2d 8 (1952).
28. *Id.* at 793, 249 P.2d 8, 15.

performing acts of investigation which appeared to fall within its proper role as an insurance carrier. As such, it could not be said that Truck Insurance Exchange changed from its role of carrier into the role of another member of the compensation family as did Dr. Shane when he changed from employer into treating doctor. However, it was strenuously urged by Mrs. Unruh that Truck had gone beyond the role of the insurance carrier by wantonly and intentionally committing deceitful illegal acts beyond all propriety, and had assumed the role of private investigator, an available third party. The court rejected this argument because the carrier did not change into another well-recognized role as in *Duprey*. However by donning the cloak of Svengalian deception, the carrier looked like it was changing from a Dr. Jekyll into a Mr. Hyde, and that was enough for the court:

> . . . we are unable to conclude that a compensation insurer remains within its proper role as such, when, as in the instant case, through its agents or others employed by it, such insurer intentionally embarks upon a deceitful course of conduct in its investigations which causes injury to the subject of the investigation. We cannot give our approval to such misconduct which tramples upon the employee's rights, by deeming it no more than the normal behavior of the insurer. In *Redner v. Workmen's Comp. Appeals Bd.*, concerning similar investigatory conduct of a compensation carrier, we said: "Evidence obtained by fraud and deceit in violation of the rights of the applicant, however, is not best calculated to ascertain the substantial rights of the parties and carry out *justly* the *spirit* and provisions of the workmen's compensation laws. The high purposes of the compensation law should not be perverted by resort to evidence perfidiously procured." (Original italics.) Our condemnation in *Redner* leaves no doubt that such conduct goes beyond the normal role of an insurer in a compensation scheme intended to protect the worker. (Citations.) A deceitful investigation, in place of an honest one, frustrates the laudable objectives of the Workmen's Compensation law. Permitting the employee to maintain an action at law for the insurer's intentional torts will subserve these objectives but at the same time will not discourage the insurer from fulfilling its proper role in the compensation scheme.[29]

THE INCONGRUITY PROBLEM

Should the Supreme Court have limited Mrs. Unruh to recovery against the carrier for its intentional torts only, and not for negligence? The limitation has created serious incongruities.

29. 7 Cal. 3d 616, 630, 498 P.2d 1063, 1073, 102 Cal. Rptr. 815, 825 (1972).

In *Duprey v. Shane, supra,* the doctrine of dual capacity created liability of the employer as a third party without limitation. Shane was held liable as employer for compensation benefits and also as a doctor for negligence. If the employer (Shane) acting as a doctor commits a wilfull injury in the course of treatment, an apparent dilemma arises. *Azevedo v. Industrial Accident Commission*[30] took away the employee's previously recognized option to "go third-party" against the assaulting employer for general and punitive damages, and restricted him to the supposedly adequate remedy for wilful misconduct provided under the Workmen's Compensation statute.[31] Is this a bar to a civil action for punitive damages in a dual capacity case? Theoretically not. Dual capacity created from one entity two distinct entities not "privy" to themselves.[32] It would not be inconsistent to allow a cause of action against "Shane, the doctor" for malpractice, negligent and wilful, with punitive damages, and at the same time the administrative remedy of compensation and the punitive award provided by Labor Code section 4553 against "Shane, the employer", subject to a setoff to avoid double recovery.

It is obvious that dual capacity creates "partial disintegration" of the compensation system. The rule of application must be one of selectivity.

The immunity statutes[33] seem to equate the employer to the carrier, one having the same immunity as the other, neither greater nor less. Yet, the legislature failed to mention the carrier in Section 4553 of the California Labor Code, which provided a remedy against the employer for wilful misconduct. The implication is that the legislature intended to leave intact a common law action against the carrier for its intentional torts, while consuming the negligence of both in the heat that forged the compensation law. This may represent a fair view of the original intent, but the doctrine of dual capacity resulted in a fracture across the structure. Shane was held for simple negligence. Does it not follow that where the carrier acts in a dual capacity, it should also be liable for its negligence? The court said no in *Unruh*, and as a result the carrier has greater immunity than the employer. This is incongruous!

The plaintiff in *Unruh* proposed to the court that while carriers act as carriers when they investigate claims, they act in the dual

30. Axevedo v. Ind. Acc. Comm'n, 243 Cal. App. 2d 370, 52 Cal. Rptr. 283 (1966).
31. CAL. LAB .CODE, § 4553 (West 1971).
32. See section on Res Judicata, *infra.*
33. CAL. LAB. CODE, §§ 3850 & 3852 (West 1971).

capacity of private investigators when they engage in elaborate "rope" subterfuges. The court refused to take judicial notice of this fact and rejected the idea of a lateral shift of personality. As private investigators, a commonly recognized distinct role, the carrier would have been a third party and like Shane, the doctor, liable for negligence.

The Supreme Court felt it was committed to follow the treatment and inspection cases in disposing of negligence. It is true that carriers investigate, provide treatment and inspect places of employment. But the plaintiff argued that the policy considerations in the treatment cases have no application in the investigation cases. It is probably true that if carriers were liable for negligent treatment, multitudes of actions would clog the courts. It seems the Appeals Board is better geared to handle these post-accident aggravations inherent in the treatment cases. Non-medical investigations on the other hand produce few injuries and liability for negligence would not strain the courts. It apparently was difficult for the court to distinguish between medical investigation and non-medical investigation.

In disposing of negligence, the court dealt with the following realities: First, there was, in its opinion, no lateral shift in capacity; it was vertical. The carrier was not acting like anyone else in the compensation scheme. Its wrong was one of excess. Second, the employer does not by excess become a third party. His liability for intentional torts is limited to the penalty in California Labor Code section 4553. In an attempt to equalize the immunity, the court limited the carrier's liability to recovery for the excess and not for negligence. Third, the torts involved in non-medical investigation are by their very nature intentional torts of deceit, invasion of privacy, infliction of emotional distress, assault and battery and conspiracy. To give redress for these torts affords ample remedy. Furthermore, all injuries sustained during the unfolding of the conspiracy may be actionable regardless of fault under Workmen's Compensation Law. Fourth, it is more consistent to hold the carrier liable for its intentional torts in all spheres of activity, such as treatment, inspection and investigation, etc., rather than to find immunity in some and not others.

RES JUDICATA

Proceedings at the Appeals Board are res judicata and a bar to

proceedings between the same parties in subsequent actions.[34] This intriguing problem appeared insurmountable in *Unruh*. However, the court simply stated that Truck Insurance Exchange which allegedly caused psychiatric injury by intentional tort, was not the same Truck Insurance Exchange that defended the Workmen's Compensation action. Res judicata only involved the same parties or their privies. Truck, the intentional tortfeasor, was not privy to Truck, the compensation carrier. Therefore, there was no bar. Setoff solved the problem of double recovery.

The formidable election of remedies defense did not exist, said the court, because plaintiff sued for a subsequent injury, not the initial injury, and because the Truck Insurance Exchange which she sued in the compensation case was not the same Truck Insurance Exchange she had sued in the third party action.

Liability of Employees of the Carrier

Unruh joined as defendants the Claims Supervisor of the Compensation Carrier and the Independent Investigator, as individuals. It was claimed that the Supervisor failed to advise the Investigator of the psychiatric background of the subject, that he was aware of the type of investigation employed by the investigator, yet directed the *sub rosa* investigation to be conducted and further directed the movies to be shown. The court found that although the employer and the carrier are synonymous, the employees of the compensation carrier are not co-employees of the plaintiff and do not, therefore, have the partial immunity given co-employees.[35]

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34. Scott v. Ind. Acc. Comm'n, 46 Cal. 2d 76, 293 P.2d 18 (1956).
35. Cal. Lab. Code, § 3601(a) (West 1971) as follows:
Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in § 3706, 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.
(3) 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.

CONCLUSIONS

1. Although this decision was made in an investigation case, the broad issue is clearly stated by the court in *Unruh*: "We must decide whether the carrier which commits an intentional tort becomes a 'person other than the employer.' "[36] This can only mean that a compensation carrier may be liable for all its intentional torts regardless of the activity.

2. It would seem to follow that wilful failure to provide benefits could create third party liability.[37] However, remedies already exist at the Appeals Board in the form of penalties for this intentional act.

3. Under what circumstances can the carrier be liable in inspection cases? It would seem that if the carrier undertakes the duty of inspection, becomes aware of a dangerous condition and takes no steps to remedy the condition; or is aware that safety orders are being violated and does nothing; or if the safety inspector recommends safety precautions which in themselves lead to injury, the carrier should be held liable on the basis of wanton misconduct approaching the quality of an intentional tort.[38]

4. Holding the employee of the carrier liable for his own negligence is significant new law. The immunity of the carrier from negligence does not protect the employee of the carrier. The carrier, a corporation or inter-insurance exchange, necessarily acts through its employees. If the carrier is immune when it negligently provides treatment, fails to provide treatment, withholds compensation benefits, inspects premises, investigates claims, or performs any other act, the employee is not immune. Therefor, all negligence actions heretofore brought, without success, against the carrier can now be brought against the individual employee of the carrier.

5. The unharnessed investigation of claimants in some cases has been shocking, even where immunity does not exist. With immunity, the investigator could be downright unscrupulous and could

36. 7 Cal. 3d 616, 630, 498 P.2d 1063, 1073, 102 Cal. Rptr. 815, 825 (1972).
37. Fletcher v. Western Nat. Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).
38. Levizon v. Harrison, 198 Cal. App. 2d 274, 18 Cal. Rptr. 284 (1962). Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952).

indeed intentionally injure a claimant with impunity. That power has not been taken away by *Unruh*.

6. The duality concept may be useful in creating negligence liability in other areas even if rejected by the Supreme Court for negligent torts in the *Unruh* case. Anyone who steps outside or beyond the status role which is privileged or immune may lose that privilege or immunity. If the employer acts in a dual capacity when it treats[39] or when it provides treatment by the company doctor[40] the employer is liable as a third party for injuries arising out of the negligent treatment thus provided.

7. The *Unruh* decision demonstrates the willingness of the Supreme Court to provide new remedies when needed. The future course of these new liabilities will be worth watching.

39. Hoffman v. Rogers, 22 Cal. App. 3d 655, 99 Cal. Rptr. 361 (1972).