Johns-Manville v. Superior Court: Employee's Right to Sue Employer for Aggravating an Industrial Disease

This note examines a recent decision of the California Supreme Court granting a cause of action to employees who suffer from an occupational disease which was aggravated by the employer's fraudulent concealment. While this decision creates a significant exception to the exclusive-remedy restraints of California's workers' compensation system, the court did not go far enough. This note suggests that only by focusing on the disease-causing conduct rather than aggravation will disease victims be adequately compensated and intolerable employer practices be effectively deterred.

INTRODUCTION

Occupational diseases[1] exact an appalling death toll in the United States. In 1978, almost two million workers between the ages of 20 and 65 reported severe or partial disability caused by occupational disease.[2] Almost 700,000 of those stricken suffered long-term total disability.[3] Work time lost in 1978 due to disabling occupational disease has been valued at $11.4 billion.[4] One report concluded that 100,000 deaths from work-related diseases

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[1] An occupational disease is one in which the cumulative effect of the continual absorption of small quantities of deleterious substances from the environment of the employment ultimately results in manifest pathology; any one exposure . . . is inconsequential in itself, but the accumulation of repeated absorptions is the factor which brings about the disease. . . .
D. O'BRIEN, CALIFORNIA EMPLOYER-EMPLOYEE BENEFIT HANDBOOK 3 (4th ed. 1976).

[2] 8 CAL. WORKERS' COMP. REP. 131, 144 (1980) (citing a June 1980 report submitted to Congress by the Department of Labor).

[3] *Id.*

[4] *Id.*

occur annually.[5] It has been estimated that asbestos-related cancer contracted by workers since World War II will cause more than 2.1 million individuals to die prematurely.[6]

The real tragedy is that many of the deaths and disabilities resulting from occupational disease might have been avoided if industry had heeded warnings given as long ago as the 1930's regarding the danger of asbestos.[7] Besides ignoring the phenom-

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[5] THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH III, 1972. While such estimates have obvious limitations, they appear to be conservative. For instance, one extensive field survey found an extraordinarily high incidence of occupational disease (28.4 per 100 workers) and indicated that only a small percentage of such diseases are ever reported. *See* D. DISCHER, G. KLEINMAN & F. FOSTER, PILOT STUDY FOR DEVELOPMENT OF OCCUPATIONAL DISEASE SURVEILLANCE METHOD (1975). As for mortalities, one study attributes at least 20% of all cancers in the United States in whole or in part to workplace carcinogens. NATIONAL CANCER INSTITUTE & NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, ESTIMATES OF THE FRACTION OF CANCER INCIDENCE IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS (Draft Summary 1978).

[6] According to estimates made by the U.S. Department of Health, Education, and Welfare, between eight and eleven million workers have been exposed to asbestos in the U.S. since the beginning of World War II. Of that total, approximately 1.5 to 2.5 million are presently employed, while the remainder—between 6.5 and 8.5 million workers—were formerly employed in environments with significant asbestos exposure, including 4.5 million who worked in shipyards during World War II. Of these workers, approximately four million are believed to have had heavy exposure to asbestos. Based on epidemiological studies of workers, it is estimated that 20-25 percent of heavily exposed workers die of lung cancer, 7-10 percent of pleural of peritoneal mesotheliem, and 8-9 percent of gastrointestinal cancers. These figures are probably underestimates of lifetime risks, because relatively few workers have yet been followed to the end of their normal lifespan. The total fraction of heavily exposed workers likely to die of these cancers is probably between 35-44 percent. Of the four million heavily exposed workers, approximately 1.6 million are thus expected to die of asbestos-related cancers. Assuming that the excess risk to the 4-7 million less heavily exposed workers is one-quarter of that to the heavily exposed workers, the total number of cancers asbestos in the less-heavily exposed group would be expected to be about 0.55 million, raising the total to about 2.15 million.

Id. at 1-2.

[7] There is ample evidence in the medical literature to have put industry on notice that asbestos was a health hazard to workers exposed to heavy concentrations of the dust. In the early 1930's, an increasing number of workers' compensation claims prompted the asbestos industry to investigate the problem of

enon of occupational disease, industry has failed to consider the compensation problems facing disease victims. The California Supreme Court recently addressed these problems in *Johns-Manville v. Superior Court.*[8]

In *Johns-Manville,* the California Supreme Court held that an employee suffering from an occupational disease which was aggravated by the employer's fraudulent concealment could bring an action against the employer for damages. The court granted the common law remedy despite the apparent exclusivity of the

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asbestos exposure. The Metropolitan Life Insurance Company conducted a study which examined the dust conditions in asbestos mines and mills. The study revealed a definite correlation between the percentage of individuals diagnosed as having asbestosis and the number of years that they had been exposed. The study recommended better dust control, annual physical and radiological examination of workers, and an industry-sponsored study of the effects of asbestos. Although the recommendations were prepared at the invitation of industry and were published in Public Health Reports in 1935, no action was taken by industry. Workers in factories and mills continued to be exposed to heavy concentrations of asbestos dust. *See* Sweeny, *The Asbestosis Time Bomb,* 14 TRIAL 17 (1978); Lanza, *Effects of the Inhalation of Asbestos Dust on Lungs of Asbestos Workers,* 50 PUBLIC HEALTH REPORTS 1 (1935).

Throughout the 1950's and 1960's, further studies and medical reports on asbestos were published. The link between asbestos and lung cancer, first observed in 1935, was definitively established by 1955. NEW YORK ACAD. OF SCIENCES, *Cancer and the Worker* 36 (1977). During the 1960's, extensive studies of the occupational effects of asbestos exposure were begun by Dr. Irving Selikoff. Dr. Selikoff found that (1) more than 80% of the asbestos insulation workers with 20 years experience in the trade had developed asbestosis; (2) the risk of lung cancer was 90 times greater if the worker smoked; and (3) 40% of the workers' deaths were attributable to asbestos exposure. *See* Selikoff, *Relation Between Exposure to Asbestos and Mesothelioma,* 272 NEW ENG. J. MED. 560 (1965); Selikoff, *Asbestos Exposure and Neoplasia,* 188 J.A.M.A. 22 (1964).

Industry has sought to minimize publicity concerning asbestos health hazards. In October 1964, the New York Academy of Sciences sponsored an international conference on the biological effects of asbestos. Immediately thereafter, a letter was sent to the executive director of the Academy by lawyers representing an association of asbestos manufacturers that included the Johns-Manville Corporation. The letter expressed concern over recent articles discussing mesothelioma and stated that "unwise treatment of research data in public discussions could cause reactions which were not justified by the state of scientific knowledge." P. BRODEUR, EXPENDABLE AMERICANS 15, 17 (1974). *See generally* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974); Comment, *Asbestos Litigation: The Dust Has Yet to Settle,* 7 FORD. URB. L.J. 55 (1978).

[8] 27 Cal. 3d 465, 612 P. 2d 948, 165 Cal. Rptr. 858 (1980).

remedies provided by the California Workers' Compensation Insurance and Safety Act.[9] However, the court distinguished aggravation of an industrial disease from the initial cause of the disease and held that the exclusivity provisions still bar an employee's action at law for his initial injury.[10]

This note examines the *Johns-Manville* decision as a purported solution to the compensation problems facing victims of occupational disease. First, this note identifies the objectives underlying the workers' compensation system. Next, it examines the court's rationale in allowing a common law remedy for aggravation of the disease. This note suggests that the court's aggravation standard is inconsistent with both the needs of occupational disease victims and the objectives of workers' compensation. Finally, this note proposes a theory based on the use of concurrent remedies[11] that would better meet the needs of occupational disease victims.[12]

I. Objectives of the Workers' Compensation System

At common law, an employee injured by an employer's intentional or negligent conduct could bring an ordinary action for personal injury. However, a combination of factors made this remedy inadequate: (1) the expense and time required to litigate; (2) the difficulty of proving the employer's violation of due care; (3) the reluctance of co-employee witnesses to testify against their employer; and (4) the employer's common law de-

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[9] Cal. Lab. Code §§ 3200-6208 (West 1971 & Cum. Supp. 1981). *See also* notes 27-28 and accompanying text *infra*.

[10] The court stated, "We conclude that while the workers' compensation law bars the employee's action at law for his initial injury, a cause of action may exist for aggravation of the disease because of the employer's fraudulent concealment of the condition and its cause." Johns-Manville v. Superior Court, 27 Cal. 3d 465, 469, 612 P. 2d 948, 950, 165 Cal. Rptr. 858, 860 (1980).

[11] "Concurrent remedies" means that an employee's claim for workers' compensation benefits does not affect his cause of action for damages in a civil suit. *See* notes 87-89 and accompanying text *infra*.

[12] This note focuses on an employer's civil liability for intentional concealment of workplace hazards. For a discussion of civil liability for an employer's intentional torts generally, see Note, *Azevedo v. Abel, Denial of Employee's Right to Sue His Employer for an Intentional Tort*, 21 Hastings L.J. 683 (1970); Comment, *Intentional Employer Torts and Workers' Compensation: A Legal Morass*, 11 Pac. L.J. 187 (1979); 8 Cal. Workers' Comp. Rep. 47 (April 1980); Cal. Workmen's Comp. Prac. § 17.27 (Cal. Cont. Ed. Bar 1973); *id.* §§ 17.27A-17.27D (Supp. 1980).

fenses.[13] One commentator described the workers' situation toward the end of the 19th century as a "picture of helplessness."[14]

Workers' compensation grew out of the recognition that the existing system of legal remedies was deficient. In supplanting the common law action, workers' compensation had several objectives. First, it was intended to assure injured workers protection against interruption of income. In addition, it was designed to provide workers with medical care for rapid rehabilitation and recovery. Finally, the drafters of the workers' compensation law sought to encourage on-the-job safety and deter injury-causing conduct.[15]

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[13] 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 1.02[3] (1980). The so-called "common law defenses" consisted of contributory negligence, assumption of risk and the fellow-servant rule. The common law fellow-servant rule provides that, in the absence of a statute to the contrary or an express contract, a master or employer is not liable to a servant or employee for injuries caused by the negligence of a fellow servant or employee. *See id.* at § 1.02[4][c]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80 (4th ed. 1971).

[14] 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 4.30 (2d ed. 1978).

[15] The objectives of the California workers' compensation system are enunciated clearly in CAL. CONST. art. XIV, § 4:

> The Legislature is hereby expressly vested with plenary power . . . to create, and enforce a complete system of workers' compensation, by appropriate legislation, and . . . to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers . . . to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation . . . to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State. . . .

See generally W. HANNA, *supra* note 13, § 1.05; A. Larson, *Basic Concepts and*

Perhaps the most important notion underlying the statutory scheme is that workers' compensation provides income insurance[16] similar to that provided by unemployment insurance, social security and temporary disability insurance.[17] In cases of industrial injuries and death, the presumption is that the employee and his dependents need a weekly income immediately to replace what has been lost. Another well recognized presumption is that following an injury, the typical employee does not have the time or resources to vindicate his rights in an ordinary civil suit. Workers' compensation satisfies both presumptions by providing prompt and predetermined benefit payments.

Providing medical care and rehabilitation services incidental to a work-related injury is a corollary to the principle that workers' compensation is concerned with income maintenance. Payment of all medical expenses assures that income-insurance benefits are not exhausted by medical bills, leaving little money to support the employee and his family.[18] At the same time, payment of medical expenses aids in the employee's rehabilitation.[19]

Objectives of Workmen's Compensation, in SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1973); REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 31 (1972).

[16] "Income insurance" is a term used to describe small and regular contributions made by the employer, the employee or both to insure that the employee will continue to receive a portion of his income whenever a specific contingency interrupts or terminates his earnings. A. LARSON, *supra* note 14, at 31.

[17] While the contingency insured against differs in each case (unemployment insurance protects the worker from economic unemployment, social security protects against old-age retirement, and workers' compensation provides payments to replace lost income due to injury or illness), the concept of payments without regard to fault is common to all. In addition, all income-protection schemes provide limited benefits to be paid weekly or monthly until the contingency ceases. Finally, all these systems provide an adequate source of support during periods of wage interruption. *Id.* at 32.

[18] CAL. LAB. CODE § 4600 (West Cum. Supp. 1981) provides: "Medical, surgical, chiropractic, and hospital treatment . . ., which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. . . ."

[19] *Id.* § 139.5 provides:

> (a) The Administrative Director shall establish . . . a rehabilitation unit, which shall include appropriate professional staff, and which shall have all of the following duties:
> (1) To foster, review, and approve rehabilitation plans. . . .
> (2) To adopt rules and regulations which would expedite and facilitate the identification, notification, and referral of industrially in-

This allows him to return to work quickly in his original productive capacity.[20] Thus, the employee and his dependents should be able to stave off the financial hardship that previously attended disabling injuries.[21]

Deterrence of injury-causing conduct is also basic to the workers' compensation scheme.[22] The system is designed to provide economic incentives for accident prevention and to encourage an interest in safety. All California employers—except the state—are required to "secure the payment of compensation" to their employees by either (1) carrying insurance against compensation liability with a company authorized to write such insurance in California, or (2) securing from the Director of Industrial Relations a certificate of consent to self-insure.[23] Each employer must contribute a certain amount to the insurer[24] in the form of workers' compensation premiums. The employer's premium is based on the relative degree of occupational hazard to which his employees are exposed.[25] If an employer maintains a good experience record with few costly industrial injuries, his insurance costs may be substantially less than the costs to an employer in the same field who has a poor experience record.[26]

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jured employees to rehabilitation services.

(3) To coordinate and enforce the implementation of rehabilitation plans. . . .

(c) When a qualified injured workman chooses to enroll in a rehabilitation program, he shall continue to receive temporary disability indemnity payments, plus additional living expenses necessitated by the rehabilitation program, together with all reasonable and necessary vocational training, at the expense of the employer or the insurance carrier, as the case may be. . . .

[20] REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, *supra* note 15, at 38-39.

[21] W. HANNA, *supra* note 13, § 1.05[5].

[22] The science of "industrial safety engineering" is considered an outgrowth of workers' compensation legislation. Included within this field are investigation of accidents and correction of hazards, education of workers in approved methods, and enforcement of laws intended to restrict negligent or improper practices. W. HANNA, *supra* note 13, § 1.05[8].

[23] CAL. LAB. CODE § 3700 (West Cum. Supp. 1981).

[24] *Id.* § 3211 (West 1971) provides: " 'Insurer' includes the State Compensation Insurance Fund and any private company . . . authorized . . . to insure employers against liability for compensation and any employer to whom a certificate of consent to self-insure has been issued."

[25] D. O'BRIEN, *supra* note 1, at 69.

[26] The degree to which safety is encouraged may depend upon the kind of

As a means of accomplishing the objectives of income maintenance, rehabilitation and deterrence, state legislatures utilized a legal principle alien to the common law—liability without fault. Under the statutory workers' compensation scheme, both the employee and the employer gain and lose certain advantages. On one hand, the employee gains the benefit of certain recovery without the expense and delay usually associated with personal injury actions. However, recovery under workers' compensation is the employee's exclusive remedy against his employer.[27] On

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insurance secured by the employer. A 1980 Department of Labor study revealed that premium incentives are effective only among employers self-insured for workers' compensation. Since a self-insured employer bears all risks, incentives for accident avoidance are substantial. On the other hand, employers insured by private insurance companies are rated according to industry rather than individual safety records. This rating system works against accident deterrence, because employers with below-average accident and illness costs pay premiums based on the costs of employers with above-average loss experience. 8 CAL. WORKERS' COMP. REP. 167 (Sept. 1980).

[27] The provisions comprising the exclusive-remedy rule are:

CAL. LAB. CODE § 3600 (West Cum. Supp. 1981)

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

CAL. LAB. CODE § 3601 (West Cum. Supp. 1981)

> Where the conditions of compensation exist, the right to recover such compensation . . . is . . . the exclusive remedy for injury or death of an employee against the employer. . . .

CAL. LAB. CODE § 4553 (West Cum. Supp. 1981)

> The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and willful misconduct of any of the following:
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> (a) The employer, or his managing representative. . . But such increase of award shall in no event exceed ten thousand dollars ($10,000). . . .

In determining whether or not the conditions of compensation concurred so as to bar an injured worker from recovering civil damages from an employer, some courts have invoked the "liberal construction rule" of CAL. LAB. CODE § 3202 (West 1971). *See* Gates v. Trans Video Corp., 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (2d Dist. 1979); Mitchell v. Hizer, 73 Cal. App. 3d 499, 140 Cal. Rptr. 790 (1st Dist. 1977); Eckis v. Sea World Corp., 64 Cal. App. 3d 1, 134 Cal. Rptr. 183 (4th Dist. 1976). CAL. LAB. CODE § 3202 (West 1971) provides:

> The provisions of . . . this code shall be liberally construed by the

the other hand, while the employer benefits from the statutory limitation on the employee award, the employer is held responsible for all injuries that occur in the course of employment regardless of fault. No-fault liability arises not because of any presumption of wrong-doing, but because work-related injuries are considered costs of production ultimately passed on to the public.[28]

The exclusive-remedy rule is equitable as applied to the typical employee-employer relationship.[29] However, the courts have made exceptions to the rule, permitting an employee either to choose between compensation benefits and civil remedies, or to pursue both, in certain situations.[30] Particular pressure to circumvent the exclusive-remedy rule arises where an employee contracts an occupational disease because of intentional misconduct of the employer. Although the *Johns-Manville* decision attempted to address this problem, the court went only part way in providing a satisfactory solution.

II. *Johns-Manville v. Superior Court*

A. Factual Background

Defendant Johns-Manville engaged in the mining, milling, manufacturing and packaging of asbestos.[31] Plaintiff Reba Rudkin had been exposed to asbestos for the entire twenty-nine

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> courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.

However, because § 3202 states that the code provisions are to be liberally construed "with the purpose of extending their benefits" for the protection of injured workers, the rule probably should be applied only when an employee seeks workers' compensation benefits—not when he seeks civil damages.

[28] W. HANNA, *supra* note 13, § 1.05[2].

[29] The phrase "typical employee-employer relationship" denotes a situation in which both the employee and the employer are subject to the relevant conditions of compensation pursuant to CAL. LAB. CODE § 3600 (West Supp. 1981). These conditions are:

> (1) that the injury take place at a time when the employee is performing a service which grows out of and is incidental to his employment and is acting within the course of such employment, and
> (2) that the injury be proximately caused by the employment "either with or without negligence."

Id.

[30] *See* notes 87-88 and accompanying text *infra*.

[31] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 469, 612 P.2d 948, 950, 165 Cal. Rptr. 858, 860 (1980).

years that he had been employed at defendant's Pittsburg, California, plant.[32] Defendant had been aware for some time that long exposure to or ingestion of asbestos was dangerous to health.[33] Notwithstanding this knowledge, defendant advised plaintiff that it was safe to work in close proximity to asbestos.[34] Defendant also failed to provide plaintiff with adequate protective devices and did not operate the plant in accordance with state and federal regulations governing dust levels.[35] As a result of the exposure, plaintiff developed mesothelioma,[36] asbestosis,[37] lung cancer and several other asbestos-related illnesses.[38]

The doctors retained by defendant to examine plaintiff during the course of his employment were unqualified and lacked adequate information regarding the risks of asbestos exposure.[39] After discovering plaintiff's disease, defendant failed to file the required First Report of Occupational Injury or Illness with the state.[40] Furthermore, defendant failed to inform plaintiff that he was suffering from a disease caused by the ingestion of asbestos, thereby preventing plaintiff from receiving teatment for the

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[32] *Id.*

[33] *Id.* For a discussion of the available medical literature concerning the harmful effects of asbestos exposure, see note 7 *supra.*

[34] *Id.* at 469, 612 P.2d at 950, 165 Cal. Rptr. at 860.

[35] *Id.*

[36] Mesothelioma is a malignant tumor of the chest and lungs or of the abdomen. There is presently no effective therapy for mesothelioma, and early diagnosis does not significantly increase the likelihood of survival. P. BRODEUR, *supra* note 7, at 15.

[37] Asbestosis is the irreversible scarring of the lungs caused by exposure to asbestos. The disease affects many kinds of workers, including shipyard workers, plumbers, electricians, construction workers and mechanics. Some families of asbestos workers have contracted the disease by inhaling the asbestos dust which contaminated the workers' clothes.

Diseases related to asbestosis include mesothelioma, bronchial cancer and other forms of cancer, particularly in the gastro-intestinal tract. Surgery, radiation and chemo-therapy are used to treat asbestos-related cancers. These treatments usually fail to effect any long-term cures, and the outlook for successful treatment of asbestos-related lung and GI cancers is far from good. Los Angeles Daily Journal, June 27, 1980, at 3, col. 1.

[38] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 469, 612 P.2d 948, 950, 165 Cal. Rptr. 858, 860 (1980).

[39] *Id. See* notes 54-55 and accompanying text *infra.*

[40] *Id.* CAL. LAB. CODE § 6409.1 (West Supp. 1981) provides:

> (a) Every employer shall file a complete report of every occupational injury or illness . . . with the Department of Industrial Relations. . . .

disease.[41]

Rudkin filed suit against Johns-Manville for fraudulent concealment and conspiracy, seeking both compensatory and punitive damages.[42] Contending that the matter was subject to the exclusive-remedy provisions of the workers' compensation laws, Johns-Manville moved for judgment on the pleadings. The trial court denied the motion.[43] When the court of appeal reversed and ordered the trial court to grant the defendant's motion, Rudkin sought review by the California Supreme Court.[44]

B. The Johns-Manville *Decision*

1. The Majority Opinion

Justice Mosk, writing for the majority, first sought to determine whether or not California Labor Code section 4553 covered intentional acts of employers which cause employee injuries. Section 4553 provides for a one-half increase in compensation benefits for an employee whose employer or an enumerated agent of the employer has engaged in "serious and willful misconduct."[45] Relying on the legislative history of the Workers' Compensation Act,[46] Justice Mosk held that the addition of the

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[41] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 469, 612 P.2d 948, 950, 165 Cal. Rptr. 858, 860 (1980).

[42] Reba Rudkin v. Johns-Manville, No. 159524 (Contra Costa County Super. Ct., 1975) Also named as defendants were several other Johns-Manville corporations, two doctors who treated plaintiff for his illness, and numerous persons sued fictitiously. The complaint alleged nine causes of action and was amended three times. Only the third and fourth causes of action, alleging that defendant was guilty of fraud and conspiracy as plaintiff's employer, were at issue in the supreme court.

[43] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 470, 612 P.2d 948, 951, 165 Cal. Rptr. 858, 861 (1980).

[44] Although Rudkin died of lung cancer after the petition for writ of mandate was filed, the supreme court found that the issues presented were not moot, since an action for personal injury survives the death of the plaintiff. *Id.*, citing CAL. PROB. CODE § 573 (West Cum. Supp. 1981).

[45] CAL. LAB. CODE § 4553 (West Cum. Supp. 1981).

[46] Prior to 1917, an employee had a choice of remedies if his injury was caused by the employer's gross negligence or willful misconduct. This rule was derived from the so-called Roseberry Act, 1911 Cal. Stats. 796, ch. 399 (*repealed in part* 1937). The liability provision of the Roseberry Act, § 3, provided:

> [W]here such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation

penalty under section 4553 was intended by the legislature to provide a substitute for the previous right of an employee to bring an action at law.[47]

Having recognized that section 4553 penalized an employer's intentional misconduct, the court proceeded to determine if there were situations in which section 4553 would not bar an employee from bringing a separate civil action. The court first

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> pursuant to the provisions of this act . . ., shall be the exclusive remedy . . ., except that when the injury was caused by the personal gross negligence or willful personal misconduct of the employer, or by reason of his violation of any statute designed for the protection of employees from bodily injury, the employee may, at his option, either claim compensation under this act, or maintain an action for damages therefor. . . .

However, the Workmen's Compensation Insurance and Safety Act of 1917, 1917 Cal. Stats. 831, ch. 586, replaced this provision of the Roseberry Act. The 1917 Act added a new section entitling the injured employee to a 50% increase in compensation in the event of serious and willful misconduct by the employer. Section 6 of the 1917 Act provided:

> [W]here such conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer . . . *provided*, that where the employee is injured by reason of the serious and willful misconduct of the employer . . ., the amount of compensation otherwise recoverable . . . shall be increased one-half. . . .

(Emphasis in original).

The Workmen's Compensation Act of 1917 was amended in 1919, 1923 and 1929 in ways not relevant to this note. When the legislature created the Labor Code in 1937, it reenacted § 6 of the 1917 Act with only slight modification as §§ 3600-3602 and 4551-4553. Although these provisions have been amended several times since 1937 (1949, 1959, 1961, 1971 and 1978), the only relevant change was that the name of the Act was changed from the "Workmen's" to the "Workers' " Compensation Act.

In *Johns-Manville*, defendant argued that the changes made in 1917 demonstrated that the right to seek additional compensation for injuries caused by the serious and willful misconduct of the employer was intended by the legislature as a substitute for the right to seek damages for such conduct in an action at law. Plaintiff claimed that the legislature intended to differentiate between intentional misconduct and serious and willful misconduct, allowing a civil remedy for the former but denying the remedy for the latter. Defendant argued that serious and willful misconduct had the same meaning as intentional misconduct, and that plaintiff could not bring a civil action merely by characterizing the employer's conduct as intentional. The court agreed with defendant. Johns-Manville v. Superior Court, 27 Cal. 3d 465, 472-73, 612 P.2d 948, 952-53, 165 Cal. Rptr. 858, 862-63 (1980).

[47] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 472, 612 P.2d 948, 952, 165 Cal. Rptr. 858, 862 (1980).

considered several cases which held that the intentional acts of the employer did not justify an action at law pursuant to section 4553.[48] The court noted that the term "intentional misconduct" applied equally to positive acts of the employer[49] and to situations where the employer was aware of a danger but failed to take precautions to avert it.[50] Nevertheless, the court held that workers' compensation was the sole remedy for plaintiff's initial injury arising from the employer's deliberate failure to assure that the workplace was safe.[51]

The court next addressed the application of the exclusive-remedy rule to intentional misconduct that went beyond the employer's failure to assure that the workplace is safe. The court catalogued a number of cases in which an employer had been held subject to civil liability.[52] The court noted a trend toward

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[48] For the proposition that workers' compensation is the worker's exclusive remedy, the court cited Wright v. FMC Corp., 81 Cal. App. 3d 777, 146 Cal. Rptr. 740 (1st Dist. 1978) (action for concealment and misrepresentation of hazards associated with handling noxious chemicals); Law v. Dartt, 109 Cal. App. 2d 508, 240 P. 2d 1013 (1st Dist. 1952) (allegations that employer was guilty of malicious misconduct in allowing an employee to use a machine without proper instruction); Buttner v. American Bell Tel. Co., 41 Cal. App. 2d 581, 107 P.2d 439 (2d Dist. 1940) (action for deceit and misrepresentations about the nature of a dangerous substance used by employee); Johns-Manville v. Superior Court, 27 Cal. 3d 465, 474, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980).

See generally 2 WITKIN, SUMMARY OF CALIF. LAW (8th ed. 1973), § 21; *id.* § 21a (Supp. 1978); CAL. WORKMEN'S COMP. PRAC. §§ 3.22, 17.23, 17.27 (CAL. CONT. ED. BAR 1973).

[49] A positive act of the employer is "an act deliberately done for the express purpose of injuring another . . . or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences. . . ." Mercer-Fraser v. Industrial Ass'n Comm'n, 40 Cal. 2d 102, 120, 251 P.2d 955, 964 (1953).

[50] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 474, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980).

[51] *Id.* at 474, 612 P.2d at 954, 165 Cal. Rptr. at 863. The court concluded that

> if the complaint alleged only that the plaintiff contracted the disease because defendant knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices to avoid disease, and violated governmental regulations relating to dust levels at the plant, plaintiff's only remedy would be to prosecute his claim under the workers' compensation law.

Id. at 475, 612 P.2d at 954, 165 Cal. Rptr. at 864.

[52] For the proposition that there are exceptions to the exclusive-remedy rule,

allowing an action at law as an exception to the rule in two situations. First, an employee could bring an action at law for injuries suffered when the employer acted deliberately for the purpose of injuring the employee.[53] Second, a civil action would be appropriate if the harm resulting from the employer's intentional misconduct consisted of aggravation of an initial work-related injury.[54] Applying the latter rationale to Johns-Manville, the court observed that defendant had concealed from plaintiff and from doctors retained to treat him, as well as from the state, the fact that plaintiff was suffering from a disease caused by the ingestion of asbestos. The court held that this concealment "was sufficient to state a cause of action for aggravation of the disease, as distinct from the hazards of the employment which caused him to contract the disease."[55]

2. Justice Clark's Dissent

In Justice Clark's view, the majority opinion would discourage

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the court cited Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (employer had deceitfully induced employee to undertake activities beyond her physical capabilities); Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952); Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (5th Dist. 1977) (employer acting in dual capacities); Meyer v. Graphic Arts Int'l Union, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (2d Dist. 1978); Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1st Dist. 1975) (employer had physically assaulted employee); Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (4th Dist. 1978) (action for intentional infliction of emotional distress unaccompanied by physical injury); Ramey v. General Petroleum, 173 Cal. App. 2d 386, 343 P.2d 787 (2d Dist. 1959) (employer had made misrepresentations regarding employee's right to medical care and had conspired with a third party to conceal from employee the fact that his injuries had been caused by the third party against whom he had recourse).

[53] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 476, 612 P.2d 948, 955, 165 Cal. Rptr. 858, 865 (1980), citing Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972); Meyer v. Graphic Arts Int'l Union, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (2d Dist. 1978); Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1st Dist. 1975); Ramey v. General Petroleum, 173 Cal. App. 2d 386, 343 P.2d 787 (2d Dist. 1959).

[54] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 476, 612 P.2d 948, 955, 165 Cal. Rptr. 858, 865 (1980), citing Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972); Ramey v. General Petroleum, 173 Cal. App. 2d 386, 343 P.2d 787 (2d Dist. 1959).

[55] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 477, 612 P.2d 948, 955, 165 Cal. Rptr. 858, 865 (1980).

employers from offering medical programs to their employees.[56] Justice Clark argued that if an employer could be held liable for engaging in special medical programs, employers would "try to remain ignorant of employees' health problems and thereby disengage themselves from special medical programs for fear of triggering . . . tort liability."[57] According to Justice Clark, tort actions should not be permitted in the absence of a specific constitutional or statutory exception to the exclusive workers' compensation remedy.[58]

III. Analysis

The court's conclusion that an action at law can be maintained against an employer, notwithstanding the fact that workers' compensation benefits are available, is sound. The court erred, however, in using the concept of "aggravation" to justify its ruling. To allow a common law remedy for the aggravation of the disease but not for the intentional misconduct that gave rise to the disease only partially fulfills the needs of occupational disease victims.

A. Application of the Court's Rationale to the Initial Fraudulent Concealment

In granting an action at law for the aggravation of the initial work-related injury, the *Johns-Manville* majority emphasized that "it is inconceivable that plaintiff contemplated defendant would . . . intentionally conceal the knowledge that he had con-

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[56] *Id.* at 480, 612 P.2d at 956-57, 165 Cal. Rptr. at 866 (Clark, J., dissenting, with Richardson, J., concurring).

[57] *Id.* at 481, 612 P.2d at 957, 165 Cal. Rptr. at 866.

[58] *Id.* at 480, 612 P.2d at 957, 165 Cal. Rptr. at 866. Justice Clark recognized statutory exceptions where the employer acted not only as an employer but also in a second capacity in causing or aggravating the injury, citing Unruh v. Truck Ins. Exchange, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972); Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952). In addition, he recognized an exception in the case of an unprovoked physical assault, citing Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1st Dist. 1975); Cal. Lab. Code § 3601(a) (West Cum. Supp. 1981). Finally, Justice Clark found the exclusive-remedy rule inapplicable where the injury was not compensable under workers' compensation law, such as when the employee alleged nonphysical injuries, citing Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (4th Dist. 1978); Ramey v. General Petroleum, 173 Cal. App. 2d 386, 343 P.2d 787 (2d Dist. 1959).

tracted a serious disease. . . ."[59] This rationale is equally applicable to intentional pre-injury conduct that leads to the initial diseased condition. It is inconceivable that an employee would contemplate that his employer would conceal from him unknown hazards in the workplace. In addition, it is unreasonable to assume that such conduct by the employer was a risk or condition incident to employment.

A second justification for the court's granting a cause of action for aggravation was the societal interest in deterring egregious conduct such as that displayed by the defendant.[60] This rationale also is equally applicable to recovery for the initial injury. First, conduct more egregious than an employer's failing to inform his employees of or to correct hazards in the work place can hardly be imagined. The lack of any effective cure for industrial diseases makes the employer's initial concealment even more deleterious than a subsequent act that prevents the victim from receiving treatment.[61]

Moreover, the majority's preoccupation with the initial injury-aggravation distinction ignores the fact that the injury attributed to aggravation is not materially different from that initially suffered.[62] Attributing part of Reba Rudkin's injuries to aggravation does not differentiate him medically or economically from an occupational disease victim who did not undergo medical examination by a company physician.[63] Both are without even a

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[59] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 477, 612 P.2d 948, 955, 165 Cal. Rptr. 858, 865 (1980).

[60] *Id.* at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

[61] *See* notes 36-37 and accompanying text *supra*.

[62] The injury alleged to have been caused by the aggravation is precisely the injury caused by the initial fraudulent concealment. There is only one injury. Accordingly, the original injury and aggravation should be treated as one compensable unit.

Another problem with the court's initial injury-aggravation distinction is the difficulty of separating the damage caused by the onset of the disease from that caused by its subsequent aggravation. At trial, the burden of apportioning damages between the initial contraction of the disease and its subsequent aggravation is on the defendant. *See* Pullman Kellogg v. Workers Comp. Appeals Bd., 26 Cal. 3d 450, 455-56, 605 P.2d 422, 161 Cal. Rptr. 783 (1980); Summers v. Tice, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948).

[63] The majority held that "the defendant concealed from plaintiff that he was suffering from a disease caused by ingestion of asbestos, thereby preventing him from receiving treatment for the disease. . . . These allegations are sufficient to state a cause of action for aggravation of the disease." Johns-Manville v. Superior Court, 27 Cal. 3d 465, 477, 612 P.2d 948, 955, 165 Cal.

modicum of hope for rehabilitation.

B. The Johns-Manville *Decision and the Objectives of Workers' Compensation*

The court appears to rationalize its result by applying rules designed for industrial accident victims to occupational disease victims.[64] But such application does not meet the needs of occupational disease victims or the objectives of workers' compensation. When an industrial accident occurs, it is usually easy to prove that the resulting injury arose out of employment because the effect follows clearly and immediately from the cause.[65] When an employee contracts an occupational disease, however, it may be extraordinarily difficult to prove that the disease is work-related, regardless of whether or not intentional employer misconduct is involved. The onset of illness can occur long after a job has begun and even after it has ended.[66] Consequently, occupational disease victims often do not receive adequate income-loss protection within an accident-oriented compensation system.[67]

Rptr. 858, 865 (1980). The court's emphasis on "treatment" may be acceptable for accident victims but must necessarily be rejected for disease victims who, for the most part, are incurable. *See* notes 36-37 *supra.*

[64] The court said that "to allow a civil remedy if plaintiff had only alleged fraudulent concealment of the initial injury would undermine the underlying premise upon which the workers' compensation system is based." 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863. Implicit in this reasoning is the idea that an employee injured in an industrial accident is no different from an employee who contracted a disease after decades of exposure to a hazardous substance—an exposure that could have been controlled. But the policies underlying the development of workers' compensation are often inapplicable to occupational disease victims. *See* notes 65-71 and accompanying text *infra.* Thus, the standards applied in the industrial accident context make little or no sense when applied to occupational disease victims.

[65] Industrial accidents are dramatic, time-definite, discrete events for which a clear and immediate relationship exists between an on-the-job occurrence and an injury. In contrast, occupational diseases develop and manifest themselves over time, and their origins are often much less obvious. *See generally* Larson, *Occupational Diseases under Workmen's Compensation Laws,* 9 U. RICH. L. REV. 87 (1974); Note, *Compensating Victims of Occupational Disease,* 93 HARV. L. REV. 916 (1980).

[66] *See* Comment, *Judicial Attitudes Towards Legal and Scientific Proof of Cancer Causation,* 3 COLUM. J. ENVT'L L. 344 (1977).

[67] For example, a worker totally disabled for life as a result of an occupational disease can expect to receive an average of $9,700 per year in workers'

The *Johns-Manville* court's preoccupation with aggravation ignores other significant differences between accident victims and victims of occupational disease. An objective of workers' compensation is to provide the injured worker and his dependents with immediate replacement income.[68] But this objective is not reflective of the needs of occupational disease victims, since they often continue working for some time after contracting the disease.[69] The same is true of the rehabilitation objective of workers' compensation.[70] The lack of known cures for most occupational diseases makes rehabilitation practically impossible.[71] Thus the existing compensation mechanism, created in response to the needs of industrial accident victims, poorly serves those with occupational disease. Only by abolishing the initial injury-aggravation distinction and focusing on the employer's intentional misconduct can this inequity be avoided.

IV. Proposal for Reform

From both a policy and a legal standpoint, an occupational disease victim should be allowed to bring an action at law for the initial fraudulent concealment of workplace hazards. An exception to the exclusive-remedy rule should be recognized in or-

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compensation benefits, compared to $23,400 for those totally disabled by accident injuries. 8 Cal. Workers' Comp. Rep. 147 (1980). In addition, public and private income programs combined replace about 60% of lost wages for victims of industrial accidents, but only 40% for victims of occupational disease. *Id.* at 145.

The gap between benefits received by occupational disease victims and accident victims is attributable to three factors. First, occupational disease claims are six times more likely to be contested than accident claims based on the ground that the disease did not arise in the course of employment. Second, on the average, occupational disease claimants are 9.6 years older than accident victims at the point of disability onset. Finally, more occupational disease cases than accident cases are settled by compromise and release. Only 15.8% of accident claims are settled, as opposed to 55.3% of occupational disease claims. *Id.* at 147.

[68] *See* notes 16-17 and accompanying text *supra.*

[69] The occupational disease victim has more time than the accident victim to make contingency plans because of the long incubation period of occupational disease. The time it takes to litigate a lawsuit, then, is not as critical for the disease victim as for the accident victim, who needs immediate relief because of the sudden, unexpected disability. *See* 93 Harv. L. Rev., *supra* note 65, at 921.

[70] *See* notes 18-21 and accompanying text *supra.*

[71] *See* notes 36-37 *supra.*

der to serve the special needs of disease victims. Only by allowing redress in a civil action will an employer's injury-causing conduct be sufficiently deterred.

A. Clearing the Way for an Action at Law

The *Johns-Manville* majority recognized that in some circumstances the employer may be liable at law for his intentional acts even though the resulting injuries are compensable under workers' compensation.[72] One long-recognized exception to the exclusive-remedy rule is based on the "dual-capacity" doctrine.[73] Under this exception, an employer is subject to civil liability when he acts tortiously toward an employee in a second capacity, *i.e.*, with obligations independent of those imposed on him as employer.[74] In this second capacity, the employer's status is that of a third party.[75]

An analysis of several cases relying on the dual-capacity doctrine demonstrates its applicability to factual situations analogous to *Johns-Manville*. One of the first cases to use the dual-capacity doctrine was *Duprey v. Shane*.[76] The court in *Duprey* found a chiropractor liable for malpractice in the treatment of an employee's injury which was incurred in the course of employment. The court found the capacity in which the chiropractor treated the plaintiff to be outside the employment relationship.[77]

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[72] *See* note 52 and accompanying text *supra*.

[73] *See generally* Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

[74] *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.80 (1970).

[75] Determining liability under the dual-capacity doctrine is not concerned with how separate or different the second function of the employer is from the first, but with whether or not the second function generates obligations unrelated to those flowing from the first, that of employer. *Id.* Under CAL. LAB. CODE §§ 3850-3864 (West 1971 & Cum. Supp. 1981), the employee and employer are given a joint and several cause of action for damages against third parties, and they may pursue both remedies subject to the employer's right to reimbursement. *See* 2 W. HANNA, *supra* note 13, §§ 23.01-23.06.

[76] 39 Cal. 2d 781, 249 P.2d 8 (1952).

[77] *Id.* at 793, 249 P.2d at 15. The court maintained that the holding of the case was justified by the unusual facts:

> It is true that the law is opposed to the creation of dual personality, where to do so is unrealistic and purely legalistic. But where, as here, it is perfectly apparent that the person involved—Dr. Shane—bore toward his employee two relationships—that of em-

The dual-capacity principle also emerges in cases where the employer acts not only as an employer but as a manufacturer of a product for sale to the public. In *Douglas v. E. & J. Gallo Winery*,[78] an employer engaged primarily in manufacturing and selling wine also manufactured scaffolding for sale to the public. The plaintiff was injured when a scaffold on which he was working collapsed. Although the injury occurred in the course of plaintiff's employment, the court applied the dual-capacity doctrine and allowed a civil action for products liability.[79] In ruling for the employee, the court stated:

> Characterizing a defendant as an "employer" and therefore automatically cloaked with immunity from common law suit is a simplification that tends to cloud proper analysis. The focus should be on the defendant's responsibility for his own acts or omissions where a different duty to take care or make sure that care is taken arises than that imposed on an employer.[80]

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ployer and that of doctor—there should be no hesitancy in recognizing this fact as a fact. Such a conclusion, in this case, is in precise accord with the facts and is realistic and not legalistic.

Id.

[78] 69 Cal. App. 3d 103, 37 Cal. Rptr. 797 (5th Dist. 1977).

[79] The facts in *Johns-Manville* are similar to those of *Gallo*. In *Johns-Manville*, workers were exposed to asbestos in the same manner as other members of the public. Consequently, Johns-Manville had a duty to warn of all known risks and hazards associated with asbestos. *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (1965); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). Johns-Manville arguably stepped out of its role as employer and became a manufacturer of an "unavoidably unsafe" product. RESTATEMENT (SECOND) OF TORTS § 402A, Comment k (1965) explains:

> Unavoidably unsafe products are those which, in the present state of human knowledge, are incapable of being made safe for their ordinary and intended use.

Under the theory of strict products liability, the manufacturer of an unavoidably unsafe product is liable to its employees for injuries proximately caused by the product's defect. *See generally* Weisgall, *Products Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035; Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 S.W.L.J. 256 (1969); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); Wade, *Strict Tort Liability of Manufacturers*, 19 S.W.L.J. 5 (1965); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); 7 FORD. URB. L.J., *supra* note 7, at 55; 93 HARV. L. REV., *supra* note 65, at 916.

[80] 69 Cal. App. 3d at 110, 137 Cal. Rptr. at 801. The court also said:

> The Workers' Compensation Act was adopted long before prod-

In *Unruh v. Truck Insurance Exchange*,[81] the plaintiff suffered a physical breakdown as a result of emotional distress inflicted by personnel of her employer's insurance carrier. The injured employee alleged that the insurer had gone beyond the role of insurance carrier by intentionally deceiving the employee during the investigation of an accident. The California Supreme Court held that when an insurer, acting as the alter ego of the employer, commits intentional torts, it becomes a "person other than the employer," thereby permitting an action at law.[82] The court concluded that

> [a] deceitful investigation, in place of an honest one, frustrates the laudable objectives of the workmen's compensation law. Permitting the employer 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.[83]

The facts in *Johns-Manville* are analogous to *Unruh*. When an employee is hired, he assumes all of the hazards and risks of employment which naturally flow from that employment. However, as the *Unruh* court recognized, the employee does not give up his right to recover damages from tortfeasors acting outside

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> ucts liability became generally recognized by the law. We recognize that if the Legislature wished to include manufacturer's liability within the workers' compensation scheme, they possess the power to do so. We do not assume that the Legislature in adopting the statute had an intent to withhold from an employee the protection manufacturer's liability doctrine now requires.

Id. at 112, 137 Cal. Rptr. at 802.

Gallo is cited with apparent approval in *Johns-Manville*, 27 Cal. 3d 465, 473 n.8 & 476 n.10, 612 P. 2d 948, 953 n.8 & 955 n.10, 165 Cal. Rptr. 858, 863 n.8 & 864 n.10 (1980). *Gallo* was also held to be controlling in Moreno v. Leslie's Pool Mart, 110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (2d Dist. 1980) (stockboy employed by a manufacturer and packager of chemicals injured while dumping contents of unlabeled bottles entitled to recover against employer in strict liability under dual-capacity doctrine); and Bell v Industrial Vangas, 110 Cal. App. 3d 463, 168 Cal. Rptr. 41 (2d Dist. 1980) (employee injured while delivering gas entitled to recover in strict liability for a defective product).

[81] 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

[82] *Id.* at 636, 498 P.2d at 1077, 102 Cal. Rptr. at 829. The court held that workers' compensation was a bar to civil liability for those counts alleging negligent infliction of emotional distress, but stated that a civil action would lie for an intentional tort of the same character.

[83] *Id.* at 630, 498 P.2d at 1073, 102 Cal. Rptr. at 825.

the employment relationship.[84] Like the defendant in *Unruh*, Johns-Manville had a dual legal personality. While acting in its normal role as an employer, it was immune from civil liability. But when Johns-Manville intentionally concealed workplace hazards, it became a "person other than the employer" and, therefore, subject to liability at law.

B. Deterring an Employer's Injury-Causing Conduct

Allowing occupational disease victims to bring an action at law provides the necessary deterrence of unacceptable employer conduct. When an employer is shielded from the consequences of his conduct, he has little incentive to correct the condition that caused the injury or to warn employees of the danger.[85] When the exclusive-remedy rule is applied indiscriminately, the employer may act tortiously toward his employees with the assurance that he will be liable only to the limited extent of workers'

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[84] One test of whether or not an employer is acting outside the scope of employment is to see if the employer's conduct is a risk or condition of the employment within the contemplation of the employee. In Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1st Dist. 1975), the court said that, although an employee might be willing to surrender his right to a civil action for the ordinary type of work-related injuries, it is not equally clear that when he accepts employment he contemplates that his employer might assault him. In *Johns-Manville*, the court stated that it was "inconceivable" that an employee would expect his employer to conceal the knowledge that he contracted a serious disease. 27 Cal. 3d at 477, 612 P. 2d at 955, 165 Cal. Rptr. at 865. Applying this test to the initial fraudulent concealment, it appears equally inconceivable that an employee would contemplate this type of conduct as a risk incident to the employment. *See* text accompanying note 59 *supra*.

[85] Full disclosure of dangers in the workplace may force an employee to decide between unemployment on one hand, and employment involving serious risk to life on the other hand. However, where a danger is known to the employee, he at least has the theoretical choice of refusing the hazardous work, and is protected in that choice by CAL. LAB. CODE § 6311 (West Supp. 1981), which prohibits retaliation by an employer when an employee refuses unsafe work. Even ignoring such statutory protection, the worker could petition for better work conditions individually or through his union.

Disclosure of occupational hazards and avoidance of employment situations involving serious risk to life are crucial elements of an integrated system for the prevention of workplace illness and injury in California. *See, e.g.*, CAL. LAB. CODE §§ 142.3, 6300-8004 (West Supp. 1981) (setting workplace safety standards); *id.* §§ 6401, 6403 (requiring employers to furnish safety devices and protective equipment); *id.* § 6408; 8 CAL. ADMIN. CODE § 3203 (1981) (requiring safe practices necessary for safe and healthful working conditions).

compensation benefits. While the employer's compensation insurance premiums may increase with additional payments of benefits, such an increase is a small penalty to pay for the conscious disregard of the rights of others.[86]

To maximize deterrence, the employee should be able to receive workers' compensation benefits, which will enable him to pay his medical bills, and also retain his right to bring a civil action.[87] Double recovery could be avoided by allowing the employer a set-off when the plaintiff is awarded both workers' compensation and civil damages.[88] Allowing the employee concurrent remedies would create additional litigation. However, the need to provide adequate compensation to victims of occupational disease outweighs the corresponding burden placed on the courts.[89]

V. Conclusion

This note has examined the holding in *Johns-Manville* as it pertains to occupational disease victims under the existing workers' compensation scheme. The *Johns-Manville* court's narrow exception for aggravation does not compensate disease victims adequately and fails to provide the necessary deterrence of employer practices that are intolerable in an industrial society. Focusing on the disease-causing conduct rather than on aggravation would better serve the needs of disease victims consistent with the principles of the California Workers' Compensation Act. Allowing an occupational disease victim an action at law for conduct that initially gave rise to the disease condition would avoid the spurious distinction between initial injury and aggravation of that injury. Egregious employer conduct associated with the onset of the disease would no longer remain undeterred.

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[86] A fault system, in contrast, provides the employer with a stronger economic incentive to reduce hazards. Such a system also motivates the worker to take care, since a determination that he is at fault would compel him to pay for his own negligence. At the same time, the fault system would tend to reduce costs of careful employers and workers.

[87] For a discussion of concurrent remedies, see 21 Hastings L.J., *supra* note 12, at 696.

[88] Johns-Manville v. Superior Court, 27 Cal. 3d 465, 478, 612 P.2d 948, 956, 165 Cal. Rptr. 858, 866 (1980).

[89] For a comparison of the costs to administer a fault system with those of administering a workers' compensation system see Kasper, *The Faults of No-Fault: The Case of Workers' Compensation*, 53 Cal. St. B.J. 92, 94 (1978).

Any system that attempts to compensate disease victims will be inherently flawed because of the complexity of the disease phenomenon. However, this fact should not lead to complacency about the inadequacies of existing compensation mechanisms. If the courts fail to recognize and remedy these inadequacies, the California Legislature should take action to alleviate the burdens of occupational disease victims.

Michael Lyon