

# poverty law Report

A REVIEW OF ADVANCES IN THE LEGAL RIGHTS OF THE POOR

Volume 8, Number 5

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## All-white jury convicts black of shooting KKKer

DECATUR, Ala. — Curtis Robinson has become the first black man ever convicted of a crime against a robed Ku Klux Klansman in a trial here in October in which the chief prosecution witness, a police officer, was shown to have ties to the Klan.

Robinson, who works as a maintenance man at City Hall, was found guilty by an all-white jury of attempted murder for shooting a Klansman threatening to attack him with a club.

The Klansman was one of more than 100 Klan members who blocked, and then attacked, a civil rights march in which Robinson was participating on May 26, 1979.

Videotape taken by a television photographer showed the wounded Klan member, David Kelso, about ten feet away from Robinson, charging at him with a raised club, at the time of the shooting.

At that point Kelso and a dozen other Klansmen had broken through a line of police officers protecting the

marchers. The police were outnumbered by 2-1.

The videotape, which was viewed in slow motion by the jury several times, also showed clearly that Robinson was standing beside his car, which he had been driving until the march was blocked by the Klan. He had then gotten out, leaving his wife and five children inside for safety.

From the time the Klan overpowered the police until Robinson shot in self-defense was a period of only eight seconds.

But the prosecuting attorney tried to call it attempted murder. To prove Robinson set out to kill a Klansman that day he put a police officer on the stand.

The officer, Lt. Marlon Owens, testified he saw Robinson driving his car at an earlier point in the march, and that Robinson waved a gun at him and yelled, "I'm gonna get me a couple of them dudes today."

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John Godbey

Klansmen break through a police line and head for black marchers (background) in an attack on a civil rights demonstration in Decatur, Ala., last year. Curtis Robinson, a client of the SPLC, was recently convicted of attempted murder for shooting one of the attacking Klansmen in self-defense.

## Alabama death penalty law dealt second blow

NEW ORLEANS — The chances that anyone sentenced to die under Alabama's present death penalty law will ever be executed grew even slimmer in October when the U.S. 5th Circuit Court of Appeals reversed the conviction of John Louis Evans and ordered him to be re-tried.

The decision followed the U.S. Supreme Court's ruling in another death case in June that found part of the Alabama statute unconstitutional.

In that case, *Beck v. Alabama*, the Court reversed the conviction and struck down a provision in the law which said that a jury in a death penalty case had to convict a defendant of capital murder or let the person go free, that there could be no "in-between," no conviction for a "lesser-included offense" such as manslaughter.

But while *Beck* made it clear that the law was unusable anymore in its original form, it didn't explicitly reverse the convictions of the 45 other Death Row prisoners already convicted under the statute. The Supreme Court left the decision of what to do with those cases up to the lower courts, subject to its review, of course. It sent *Beck* back to the Alabama Supreme Court.

While *Beck* was being deliberated there, the *Evans* decision came down from the 5th Circuit, where the case had been on appeal for nearly a year.

By a 2-1 vote, a panel of 5th Circuit judges ruled that the stricken provision of the statute was so critical to the law, and to the trial process itself, that *Evans* had to be given a new trial.

"The judges simply said that the preclusion of consideration of lesser-included offenses in a capital case was so distorting that it ruined everything in terms of the reliability of the trial process," said Poverty Law Center Legal Director John Carroll. Carroll said that every decision an attorney made about how to try a case — what witnesses to use, what concessions to make, what closing arguments to deliver — was affected by knowing the jury had only two choices: guilt or innocence of capital murder.

The 5th Circuit's decision means that everyone tried under the law is entitled to a new trial, including about 30 defendants whose jury-imposed death sentences were reduced to life-without-parole by trial judges. The ruling is so far-reaching because of the nature of the

Evans' case.

Evans and a co-defendant, Wayne Ritter, shot and killed a pawnshop owner in a robbery in Mobile in 1977. At their trial they took the stand to ask the jury to sentence them to death. After 15 minutes of deliberations, the jury agreed to.

But the 5th Circuit panel ruled that no appellant can be executed under an unconstitutional scheme even if, at trial, he puts up no defense.

Alabama Attorney General Charles Graddick, nicknamed "Electric Chair Charlie" by the press because of his obsessive support of capital punishment, says he will ask the full 5th Circuit to overturn the *Evans* decision. If they don't, he promises to go to the U.S. Supreme Court.

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## LEGAL AID

# Piercing the shield of workmen's comp — II

*Ed. Note — This is the conclusion of an article which began in the last issue of the PLR on the right of workers to seek damages outside the avenues of workmen's compensation for injuries intentionally inflicted by their employers.*

By Dennis N. Balske

Today's workmen's compensation laws do not provide workers adequate protection from serious injury or full compensation for their injuries. Therefore, in cases where compensation benefits either will not promote correction of the unsafe condition which caused a worker's injury or will not fully compensate the worker, attorneys representing such workers should pursue common-law tort actions.

There are three situations in which common-law tort actions ought to be brought: (1) when the defendant is an insurance carrier, company physician, safety consultant or in-house safety worker — in these cases the defendants, as third parties, are not protected by the exclusive-remedy provisions of compensation acts; (2) when the injury is intentionally inflicted — exclusive remedies' protection was not designed to cover non-accidental injuries; and (3) when the injury inflicted causes no physical disability, e.g., when disabled workers forego workmen's compensation due to a scheme to defraud them out of compensation benefits. The first two situations were discussed in the previous article. The third, the non-physical injury, is fully set out below.

However, before discussing non-physical injuries, a brief update of the intentional injury theory is necessary. Since the publication of the previous article, an exciting development has occurred. The California Supreme Court has held an asbestos manufacturer liable for fraudulently concealing from one of its workers the fact that he was suffering from a disease caused by the inhalation of asbestos, where the scheme prevented him from receiving treatment for the disease and induced him to continue to work under hazardous conditions. *Johns-Manville Products Corporation v. Contra Costa Superior Court*, 165 Cal. Rptr. 858 (1980).

The facts in *Contra Costa Superior Court* closely parallel those in the lawsuits presently pending against two of the country's largest textile manufacturers for fraudulently concealing from

many of their workers that they are suffering from a disease caused by the inhalation of cotton dust. In both cases, the workers are exposed to harmful levels of dust. When they develop lung disease from inhaling the dust they are not told that their disease was caused by the dust. Finally, when they become too sick to continue working, they are let go and, as with the worker in the *Contra Costa* case, they are left to die a painful death. Faced with these facts, the California Supreme Court concluded 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." 165 Cal. Rptr. at 860.

In reaching this conclusion, the Court carefully distinguished between the hazards of employment which caused the original contraction of the disease and the aggravation caused by the fraudulent scheme to cover up its cause. Whereas it held that the exclusive remedies provision of the compensation act would bar recovery for the initial contraction of the disease, the Court found the worker's claim for aggravation of the disease was not barred. The Court reasoned that while the worker "could have anticipated he might be injured because the defendant concealed the dangers of the workplace, it is inconceivable that he contemplated defendant would, as he alleges, intentionally conceal the knowledge that he had contracted a serious disease from the work environment, thereby aggravating the disease, and by accepting employment he would surrender his right to damages at law for such conduct." 165 Cal. Rptr. at 865.

The Court's reasoning should serve as an example to all who bring common law actions under the intentional tort theory. Those seeking common law damages should make painstakingly clear the fact that they are not seeking damages for the contraction of an occupational disease, but that the crux of the lawsuit is the aggravation of the disease caused by the employer's fraudulent scheme.

### *The Non-Disability Injury*

By definition, workmen's compensation statutes cover workers for employment-related disabilities. Each state has

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## Prisoner placed in isolation for writing governor of gripes

MONTGOMERY — Like other prison reform groups, the Southern Poverty Law Center receives many letters each month from inmates all over the South accusing prison officials of wrongdoing. Many of the stories are far-fetched, but some of the most outrageous of these prove out, as in the case of a letter that arrived from an Alabama prisoner last Spring.

The author had been thrown into isolation for 30 days, he wrote, simply because he sent a letter to the governor complaining about prison conditions.

But that wasn't all, he complained.

## 5th Circuit orders new trial for Evans

(Continued from Page 1)

Meanwhile, one last question lingers whether Evans, Beck, and the other defendants can be tried for the death penalty again.

The Alabama Supreme Court heard oral argument on that question in October. The attorney general says they can; SPLC lawyers say they can't.

The law has a "severability" clause which says that any provision of the statute found unconstitutional can be "severed" and the rest of the law can stand. Center attorneys question, however, whether a law can be gutted, as the U.S. Supreme Court did to this statute in June, and still be valid.

The Center has represented Beck and Evans on appeal.

He had been given a disciplinary (his first since going into prison); had been "busted" to a higher custody; and had been shipped out of a low-security "honor camp" to a medium-maximum security prison.

A check of the disciplinary papers the writer enclosed showed that the inmate's charges were true.

Center attorneys, who tried without success to settle the matter with prison officials administratively, now have filed suit in federal court on behalf of the inmate, Tommy Arthur, to have him returned to his original status. The suit is styled *Arthur v. Britton*.

Because writing the governor is neither a crime nor a violation of any prison regulation, Arthur was disciplined under Rule 25, the prison system's disciplinary "catch-all."

Rule 25 reads, "Miscellaneous offense to include any offense not specifically addressed in previous offenses. Violators will forfeit good time commensurate with the severity of the infraction."

Center attorney Ira Burnim, who is handling the case, thinks the rule is unconstitutional.

"There are 24 other rules that completely cover any conceivable improper behavior — gambling, escape, assault, and everything else. Rule 25 exists only to give prison officials a way to punish inmates they're out to get," he said.

The suit is a class-action. In addition to the individual relief it asks for Arthur, it petitions the court to declare Rule 25 unconstitutional and to reverse all disciplinary convictions under it. Any "good time" lost would be restored. Good time is a formula for rewarding prisoners by shortening their sentences for good behavior.

Center attorneys have learned of widespread abuse of the disciplinary procedure related to Rule 25. At Tutwiler Prison, the state prison for women, prisoners have been convicted under the rule for having wrinkles in their bedspreads and other petty non-infractions.

Arthur was designated an "exceptional inmate" by corrections officials in 1978.

## Judge quits; couple weds, drops suit

TUSCUMBIA, Ala. — Judge Felix Felton has resigned, a new probate judge has been appointed in his place, and Edward Sharpley has at last married Thalia Odom, closing the case on a lawsuit filed by the Southern Poverty Law Center last summer.

The suit developed over Judge Felton's refusal in May to issue a marriage license to Sharpley and Odom, an interracial couple, because they are of different races. Sharpley is black, Odom is white.

Felton told the couple it was against his religion to issue licenses to persons not of the same race.

Sharpley then contacted Center staff attorney Ira Burnim, who filed suit in federal court in Birmingham. At a hearing in August Felton admitted refusing to sell the license and then announced his intention to resign from office rather than issue it.

His office was filled by an appointment of the governor, and the new probate judge promptly issued Sharpley

and Odom the license. They were married in September.

Earlier, when it was first reported by the press that the suit had been filed, a truck belonging to Odom was set afire and destroyed as it sat in Sharpley's driveway.

No arrests have been made, but the Center has learned through sources that members of the same Klan group that attacked black protesters in Decatur, Ala., last year are responsible for the burning.

# Center tries to rescue handicapped youth

MONTGOMERY — Willie Ferguson is being held in the county juvenile detention center here, though it's doubtful he understands why.

Court records show that on July 15, 1980, Willie, who is 20, was arrested for stealing a car. It was his second arrest for car theft.

Like the previous time, he didn't really go anywhere or do anything in it, and he didn't use it to commit another crime. He and a friend just drove around town for awhile.

This time the adventure ended in a wreck. No one was hurt, luckily, and damage to the car was minor.

These thefts were a sort-of graduation for Willie. He used to steal bicycles. In fact, he was one of the most prolific bike thieves in town. He had such a reputation, and kept the police so busy, that the officers began giving him abandoned or unclaimed bikes in the hope that, with one of his own, Willie wouldn't steal other peoples' bikes. It didn't work.

Willie has behavioral problems. They are well-documented, at least those of the last four or five years, a time when he has been bounced around from juvenile court to one state agency or another. He is a client no one will have for long.

But before that, not much at all is known about him. Caseworkers seeing him today have no history to go on. It is as if, in his early teens, Willie simply materialized.

The truth is, society ignored Willie's problems until he became a problem for society.

Willie is black. He has been deaf since birth. In the 1960s, when he was growing up here, there was no such thing in the schools as "special education" for handicapped children, if the children were black.

A deaf child like Willie either went to school with the "normal" kids or he didn't go at all, unless he was lucky enough to be placed in one of the few state institutions for black handicapped youngsters. (These were often poorly funded.)

So Willie never went to school, and the state, indifferent to a poor deaf-mute black kid, didn't intervene. While the other kids his age were in class, Wil-

lie was hanging around on the streets with older boys.

— He grew into a young man unable to read or write. He still can't. He is cut off from communicating with other people except for the little bit of formal "sign" he has picked up and for a child's ability to convey his wants or needs by pointing out objects or people.

No one knows how much or how little Willie can conceptualize, but it seems likely that he can't understand the idea of right and wrong, for instance, or even what he's doing at the detention center. He is not retarded, just underdeveloped.

Willie's first contact with the bureaucracy that bears responsibility for helping handicapped people was when he was about 11 or 12, his mother says, after he was accidentally shot. He was hospitalized for treatment, and in the hospital he met a compassionate nun named Sister Mary Lucy. She liked Willie and, seeing he needed therapy, enrolled him in a rehabilitation program, paying some costs associated with the program herself.

But Willie experienced problems in the program (his mother doesn't recall what, exactly), and when Sister Mary left town, he stopped participating.

One of his next encounters was when he turned 16. At that age he became eligible for services provided by the state vocational-rehabilitation office. A decision was made to send him to the Alabama Institute for the Deaf and Blind on a "voc-rehab" grant to determine whether he was vocationally trainable.

Before an assessment was made, the grant was terminated when Willie was kicked out of the school.

In Willie's case, and no one knows how many others, voc-rehab read its responsibilities under existing federal law very narrowly. The law says that voc-rehab is to render whatever services are required to make a potentially employable person actually employable, including providing special services for clients with behavioral problems.

Voc-rehab admits Willie is employable but for his behavioral problems, but so far has been unwilling to provide a program to treat it.



Willie Ferguson and his SPLC attorney, Ira Burnim.

There is no question that Willie is an able and charming young man. He is troubled, but psychologists and others who have evaluated him uniformly agree that he has great potential.

Center attorney Ira Burnim, who is handling Willie's case, is attempting to

get the state to place Willie at a program which offers the services and provides the supervision he needs. But no such facilities exist in Alabama, and voc-rehab and the special education office of the state department of education have refused to agree to fund Willie's treatment in an out-of-state setting.

## Death penalty aids available

Two new death penalty litigation aids are now, or soon will be, available from the Southern Poverty Law Center. The first, *New Strategies for the Defense of Capital Cases*, written by staff attorney Dennis Balske, is a reprint of a 1979 law-review article. It presents a step-by-step explanation of how to try a capital case, from the initial meeting with the client through the penalty phase. It is available now for \$.50 (30 pp.).

The second publication, *Penalty Phase of a Capital Case* (200 pp.), is a trial manual based on a 1978 penalty-phase hearing in Georgia in which Center attorneys won a life sentence for a young man previously sentenced to death. After many long delays, *Penalty Phase* has gone to the printer. Orders

will be filled early next year. Its cost is \$3.75.

Other publications still available from the Center are *Motions for Capital Cases* (171 pp.), \$3.75; and *Voir Dire in a Capital Case* (192 pp.), \$3.75.

Each of these litigation aids is sold at cost but will be provided free of charge in case of indigency.

These works draw on the experience Center attorneys have gained trying death penalty cases across the South. Center attorneys accept capital cases which present difficult factual problems or novel legal questions in order to develop new trial techniques. This knowledge is then passed on to public defenders and other attorneys involved in death penalty litigation.

## Center sues prison official for killing escapee

In the early evening of March 15, 1980, Arthur Ayler, who was serving a six-year term for buying and receiving stolen property, escaped from an Alabama prison. A few minutes later he was reported missing when he didn't "catch his bunk" for a bedcheck.

What reasons Ayler had for running, and why he didn't get any further away than he did, one can only guess. At midnight he was shot to death by the deputy commissioner of the Alabama Department of Corrections as he walked down a dirt road only three or four miles from the prison.

Ayler was the second prisoner shot to death while escaping in six months. Since then, a third inmate has been similarly killed. Two of the three prisoners, including Ayler, were black.

The explanation for the three shootings cannot be found in statistics. Escapes have increased, but not dramatically. Instead, it now seems to be depart-

mental policy to shoot-to-kill escaping prisoners, regardless of the circumstances relating to the individual escape. Sources in the department confirm this.

The tragedy of such a policy is apparent in the Ayler case. Arthur Ayler was 24 years old at the time of his death. He had begun serving his sentence only a short time before, but he had been in prison long enough for the initial testing and evaluation conducted on new inmates to have been completed.

Ayler was a nonviolent offender. He had never committed, or tried to commit, a crime involving the use of force. The tests depicted him as a person who actually feared violence.

Because of the way Ayler scored on the tests, he was classified as a minimum-security inmate and was sent to an "honor camp."

The night Ayler was killed Joe Hopper, the deputy commissioner of the Alabama Department of Corrections,

was notified that he had escaped and drove out to the prison, which is near Montgomery.

One of the first things Hopper did was look at Ayler's institutional file, or "jacket." He thumbed through it, noting the length of Ayler's sentence, what it was for, and that Ayler had no record of a violent crime.

He then got into his unmarked state car and left the prison. After driving only a short distance, he noticed a young man walking down the road in his direction.

Hopper stopped and asked him if he were Arthur Ayler. Ayler said "no," and kept walking.

Hopper was suspicious, and began backing up, keeping Ayler in his headlights. After a few more steps, Ayler started to walk into a field alongside the road, when Hopper got out of his car and called, "Hold it! Hold it!", but Ayler didn't halt.

Without identifying himself as a law enforcement officer, Hopper warned Ayler that he had a gun and would shoot him if he refused to stop. But Ayler kept walking.

Without any further warning Hopper fired, and Ayler fell dead, his spinal cord cut in two.

For the first time that night, Hopper then radioed for assistance.

SPLC attorney Ira Burnim, who has filed suit on behalf of Ayler's father, thinks Hopper abused his discretion as a peace officer in killing Ayler.

Like statutes in many states, the law in Alabama permits deadly force to be used against a fleeing inmate imprisoned for a felony without reference to whether the prisoner has committed, or tried to commit, a felony involving the use of deadly force; or otherwise indicates that he is likely to endanger human life or inflict serious injury unless apprehended without delay.



## KLANWATCH

The Southern Poverty Law Center is concerned about the resurgence of the Ku Klux Klan, both in the South and in places where its presence has not been felt before now. Although its membership is still small and is divided among many factions, the Klan poses a real threat in some parts of the country to the lives and security of many black people and other minorities. In recent months its message of racism and hatred has been expressed through escalating violence and intimidation. While this threat persists, the Center will follow the activities of the Klan and report on it from time to time through the Poverty Law Report.



Chris Bell

CULLMAN, Ala. — What one F.B.I. agent in Alabama has called "the most unpredictable . . . the most dangerous" faction of the Ku Klux Klan has organized a paramilitary unit to prepare for a "race war" it expects to break out in the U.S. within five years. Calling itself the "Klan Special Forces (KSF)," the group trains one-weekend-a-month near here in the hills of north Alabama, moving its camp from time to time to avoid detection. The unit, an outgrowth of the Alabama "klavern," or chapter, of the Invisible Empire, Knights of the Ku Klux Klan, models itself after military elites like the Army Green Berets, although a number of its members have no military experience. KSF leader Terry Tucker, a supervisor at a Cullman factory, was among 100-150 Klan members who attacked a group of black protesters peacefully marching in Decatur, Ala., in 1979. The attack resulted in Curtis Robinson's conviction for shooting a Klansman in self-defense (see page 1). Tucker recently gave several reporters a look at the KSF camp, after leading them to the site blindfolded. He told a *Newsweek* reporter that the Klan has formed other KSF squads in Mississippi, Georgia, Tennessee, and two unnamed Northern states (*Newsweek*, Oct. 6, 1980). The Invisible Empire is led by Bill Wilkinson of Denham Springs, La., and claims members in all 50 states.



Garry Nungester

GREENSBORO, N.C. — As the current issue of the *Poverty Law Report* was being written, defense lawyers had rested their cases, and the state had begun its rebuttal in the murder trial of six Ku Klux Klansmen and Nazis charged with killing five members of the Communist Workers Party last November at an anti-Klan rally in a black neighborhood.

The Klansmen belong to the same Klan faction, the Invisible Empire, Knights of the Ku Klux Klan, whose members attacked peaceful black protesters in Decatur, Ala., last year (see above). If convicted, the Klansmen could be sentenced to death. Unlike most capital murder defendants, particularly those who are black, some of the Klansmen being tried in these murders have been allowed to make bail and remain free while awaiting trial.

CHATTANOOGA — A Ku Klux Klansman charged with assault with intent to murder for shooting four black women in a hit-and-run attack here in April has been found guilty of only a misdemeanor by an all-white jury. Two other Klansmen were acquitted for their part in the incident. The men, members of the United Empire of the Ku Klux Klan, based in Athens, Tenn., had just burned several crosses in a black neighborhood and were on their way out of the area when one of them fired a shotgun, hitting the women. During civil disturbances that followed the report of the jury's verdict, another Klansman, a former member of the Invisible Empire, Knights of the KKK, was arrested for possession of a homemade bomb. The victims have now filed a civil suit against the Klansmen, charging them with violating their civil rights.

### Curtis Robinson convicted in shooting

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But on cross examination Southern Poverty Law Center staff attorney Morris Dees challenged Owens' story and brought to light the fact that Owens works part-time for a Ku Klux Klansman.

The Klansman, Paul Watson, operates a small-engine repair shop in the city and has known Owens all his life. He called the officer "one of my best friends," in testimony on the second

day of the trial, and admitted the two had had breakfast together that morning.

Robinson was sentenced to five years in prison, but the sentence was suspended, and the judge then placed him on two years' probation.

Dees and Legal Director John Carroll, who helped try the case, will appeal the conviction. They expect a higher court to reverse it on the basis of pre-trial publicity and this county's racial climate.

## Workers' right to sue 'at law' aided by ruling

(Continued from Page 2)

its own schedule of benefits, depending upon the nature and extent of the disability. Accordingly, if a worker is injured but incurs no disability, he will be free to seek common law damages, because the exclusive remedies' provision only prohibits common law recoveries for work-related "disabilities."

For example, a worker who is assaulted by a fellow employee and only incurs minor injuries that are not disabling can only pursue a common law recovery. The courts have uniformly held that because no disability results, the non-disability claim does not fall within the scope of the compensation act and the plaintiff must sue at common law. See, e.g., *Ritter v. Allied Chemical Corporation*, 295 F.Supp. 1363 (D.S.C. 1968), *aff'd* 407 F.2d 403 (4th Cir. 1969).

Another example is the situation where an employer and/or workmen's compensation carrier interferes with the worker's recovery of compensation. Many courts have refused such defendants the protection of exclusive remedies' provisions. See, e.g., *Broadus v. Ferndale Fastener Division*, 269 N.W. 2d 689 (Mich. App. 1978).

In *Broadus* the complaint charged that the employer and its compensation carrier acted in collusion to deny benefits for a compensable injury. In upholding the worker's claim, the court made what it termed a crucial distinction. The plaintiff was not seeking as damages the workmen's compensation benefits allegedly due. These benefits were paid as a result of a settlement of the workmen's compensation claim.

The plaintiff was seeking "separate damages for emotional distress caused by the intentional and wrongful denial of these compensation benefits. It is the emotional and mental injuries which are the subject of the lawsuit, and which are claimed by plaintiff to be not compensable under the Act and thus actionable in a common-law tort suit." *Id.* at 692.

In both examples above, the essence of the tort was non-physical. According to Professor Larson, this "non-physical" essence makes the tort actionable at common law. He states:

"If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death, the action should be barred even if it can be cast in the form of a normally non-physical tort."

2A Larson, *supra*, § 68.34 at 13-31, 32.

Therefore, even if the tort seems like one not contemplated by workmen's compensation, such as fraud, if the resulting injury is physically disabling, the action will be barred by the exclusive remedies provision. See, e.g., *Bevis v. Armco Steel Corporation*, 93 N.E. 2d 33 (Ohio 1949).

The textile mill abuses described earlier pose interesting questions under this test. The mills' fraudulent concealment of the dangers of cotton dust inhalation, as well as the work-related nature of the disease being suffered by many of their workers, caused physical, disabling injuries. Should the mills therefore be entitled to exclusive remedies' protection for their scheme to

keep workers from applying for compensation benefits? They should not.

The fraudulent scheme to prevent workers from filing for compensation is a separate tort from the concealment of the dangers of cotton dust inhalation. More importantly, separate injuries flowed from this scheme — the workers, unaware of the availability of compensation benefits for their disability, were forced to live a substandard lifestyle, unable to work and living without benefits that would have enhanced their lives. Already disabled, they were not inflicted with any other physical injury or disability, but instead suffered nondisabling emotional distress. The workmen's compensation disability schedules provide no benefits for this type of injury.

A contrary result would defy logic and common sense. It would allow an employer to escape liability by claiming that it had intentionally inflicted the original injury that caused the worker to be injured and to become eligible for compensation. This would encourage employers to both provide an unsafe workplace and to direct injured workers from compensation benefits. Such a system flies in the face of every principle of tort law.

Another issue requires some discussion here. In the two lawsuits recently brought against the textile mills, the mills have claimed that the workers incurred no damages because workmen's compensation benefits are still available to them.

More specifically, the mills have argued that if the workers can establish that they were defrauded from compensation, they can still file for and have not lost their entitlement to benefits, because fraud tolls the statute of limitations for filing for compensation benefits.

This defense is spurious. Even if the workers can persuade the compensation authorities of the fraud and are awarded full compensation, they still will have suffered injury, because they were forced to live an impoverished lifestyle during the period they were unaware of the work-related nature of their injury.

Although the compensatory damages for such a non-disabling injury are limited, proof of the intentional scheme will make punitive damages available. This fact makes such a claim one well worth pursuing.

The theories and arguments presented above only scratch the surface. Others, such as an argument that the employer breached a covenant of good faith and fair dealing, may be available in some jurisdictions. See e.g., *Fletcher v. Western National Life Insurance Company*, 10 Cal. App. 3d 376 (1970). Moreover, there is a tremendous amount of case law, as well as numerous law articles, which are relevant to this area of the law. Unfortunately, space does not permit a more detailed discussion here.

Therefore, when presented with an egregious case involving an injured worker, where compensation benefits will be inadequate, look closely at the fine print in your state's compensation act and closely research the law. Chances are that if some blatant misconduct is involved, you will find abundant authority supporting a common law action in your client's behalf.