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Workmen's Compensation: Exclusion of Evidence Obtained by Deceitful Inducement

ever, *In re Morgan Guaranty Trust Co.* appears to represent a hopeful departure from the inflexible nature of its predecessors.

Morgan Guaranty may well be the first step toward a final acceptance of the proposition that the donee owns the appointive property and that the exercise of the testamentary power should be governed by the law of the donee's domicile. Since that proposition is subject to modification in light of the policies of the jurisdictions involved, the New York court's rationale has presented an improved, common sense method of handling similar cases in the future. Traditionally, New York has been a leading jurisdiction in trust cases, and it is to be hoped that *Morgan Guaranty* will be followed throughout the American courts.

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WORKMEN'S COMPENSATION: EXCLUSION OF EVIDENCE OBTAINED BY DECEITFUL INDUCEMENT

Insurance companies in workmen's compensation cases are sometimes faced with a difficult proof problem in exposing a suspected malingerer. Exaggerated or wholly fraudulent claims of disability based, for example, on "back pains" may succeed if such claims are otherwise credible in light of the circumstances surrounding the accident. Motion pictures of the claimant, taken without his knowledge, often provide valuable defensive evidence by showing activities inconsistent with his "disability."[1]

In appropriate cases, however, the insurance company or its private investigators may not be content with passive observation. Instead of waiting for the claimant to impeach himself through his normal activities, the investigators trick him into performing specific acts, films of which would tend directly to refute a particular disability claim.[2]

This tactic has come under review in *Redner v. Workmen's Compensation Appeals Board*,[3] a recent California Supreme Court decision. It was held that if a claimant was tricked into engaging in activities which he otherwise would not have undertaken, motion pictures thereof may not

[1] *See, e.g.*, Lambert v. Wolf's Inc., 132 So. 2d 522 (La. App. 1961). Motion pictures can of course be effective in other actions where disability is in issue. *See, e.g.*, Mirabile v. New York Cent. R.R., 230 F.2d 498 (2d Cir. 1956) (FELA action); Witt v. Merrill, 210 F.2d 132 (4th Cir. 1954) (action for personal injury damages).

[2] In the language of the trade, the claimant is thereby set up for a "rope job." Chernoff, *The Demise of the Sub Rosa Investigation*, 45 J. ST. B. CAL. 853 (1970).

[3] 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971).

be used as evidence to defeat a disability claim in a workmen's compensation proceeding. The precise holding on the facts went against what little precedent exists,[4] breaking new ground in this narrow area. Of greater importance is that the reasoning upon which the holding was bottomed invites inquiry into the broader question of the court's role in regulating the methods by which civil litigants may procure evidence.[5]

The facts[6] giving rise to the ruling in *Redner* were essentially undisputed, except for the extent of the disability. The claimant, a truck driver and delivery man, suffered a back injury in April, 1967, while lifting heavy cartons. The insurance company paid out temporary disability compensation for fifteen months, during which time the claimant was twice hospitalized, operated on once, and given periodic medical examinations and treatment. From September, 1968, to shortly before the referee's initial hearing in October, 1969, he was employed sporadically in part-time, light-work jobs, still complaining of back and leg pains. Meanwhile, the carrier, in July, 1968, had retained a private investigating firm to check into his claim. One of the investigators befriended Redner and invited him to his ranch for a weekend, whereupon after many drinks and little food, Redner went horseback riding at the host's suggestion. A second investigator, hidden, took movies of Redner saddling and riding.[7]

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[4]Extensive research has turned up only two reported cases where the objection to the use of motion pictures showing acts which were deceitfully induced was raised: Maryland Cas. Co. v. Coker, 118 F.2d 43 (5th Cir. 1941) and McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E.2d 289 (1940). In both cases, the motion pictures were held admissible; neither was cited in *Redner*. For a discussion of the use of motion pictures in litigation, see Paradis, *The Celluloid Witness*, 37 U. COLO. L. REV. 235 (1965).

[5]This discussion will deal only peripherally with the development of the exclusionary rules in criminal cases based on the fourth amendment protections against unreasonable searches and seizures by law enforcement agencies. *See* note 45 *infra*. For discussion of the application of the fourth amendment to noncriminal cases, see Note, *Admissibility of Illegally Obtained Evidence in Noncriminal Proceedings*, 22 U. FLA. L. REV. 38 (1969), and Note, *Constitutional Exclusion of Evidence in Civil Litigation*, 55 VA. L. REV. 1484 (1969).

[6]485 P.2d at 801-02.

[7]The court went on: "Thereafter, on the next day applicant rode again. Unobserved by the riding party, Chavez took more motion pictures of applicant's activities." *Id.* at 802. It is clear that at least part of the proffered motion picture evidence was gathered the following day. But the court made no reference to any specific act of inducement by the investigators which lured Redner into riding the second day. Thus it would appear, at least from the court's version, that the film of the second day's riding would, by the court's own holding, not have been "obtained . . . by deceitful inducement of an applicant to engage in activities which he would not otherwise have undertaken." *Id.* at 807. Whatever effects the cocktail party and the host's suggestion had had the day before on his inclination toward horseback riding, his second foray seems to have been completely voluntary. The court must have felt that all the footage was tainted by the sham weekend, but the discrepancy points up a possible difficulty in applying the test of "engage in activities which he would not otherwise have undertaken." *Id.*

The insurance company immediately ceased the compensation payments; it also showed the film to two doctors, neither of whom had examined Redner for several months. Both declared that Redner was no longer disabled. A third doctor, who had not seen the film, examined Redner in June, 1969, and felt that he was precluded from doing heavy lifting.

In October, 1969, over a year after the horseback-riding incident, the referee's hearing was held.[8] The carrier eventually introduced the reports of the two doctors who had seen the film, but held the motion picture evidence back. The referee refused to admit the medical reports, apparently because they were based on the doctors' viewing of the film. He rated Redner's "permanent 'disability precluding more than light work' as 57 percent."[9]

Petitioning the appeals board for reconsideration, the insurance company offered to present the motion picture as evidence. The appeals board granted the petition, viewed the film,[10] and, relying squarely on it as convincing evidence of a lack of permanent disability, determined that Redner's permanent disability ended in September, 1968, the date of the first doctor's examination.

The California Supreme Court annulled the appeals board order and reinstated the original award, first finding procedural error in the appeals board's arbitrary grant of reconsideration and an abuse of discretion in allowing the carrier to withhold the motion picture until its petition for reconsideration. But the court asserted that even if the motion picture had been properly introduced, the referee and the Board would not have been allowed to rely on it because the carrier had obtained it by "fraudulent inducement."[11] Finally, the court found that the appeals board's decision lacked the support of substantial evidence, with or without the motion picture and the resultant medical reports.[12]

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[8]For a comprehensive discussion of referee hearings, see Bancroft, *Some Procedural Aspects of the California Workmen's Compensation Law*, 40 CALIF. L. REV. 378, 386-90 (1952).

[9]485 P.2d at 803.

[10]The California Supreme Court also found error in the failure of the appeals board to allow Redner to cross-examine the cameraman-witness or present rebuttal evidence. *Id.* at 806.

[11]*Id.*

[12]The court reasoned that even with the motion picture, there was no substantial evidence to support a finding of no permanent disability since (1) the carrier's attorney conceded that the film did not show that Redner could do anything more than light work; (2) the film did not contradict the third doctor's finding that Redner could not perform heavy work; and (3) Redner's riding (at least the first time) took place while he was under the influence of alcoholic beverages, which might have reduced his pain. *Id.* at 809.

The focus of this discussion, as indicated, is upon the court's direction to the appeals board:

> We therefore conclude that the board may not rely upon evidence obtained, as in the present case, by deceitful inducement of an applicant to engage in activities which he would not otherwise have undertaken.[13]

The above language suggests a few initial considerations. First, since the court, by its own admission, could have disposed of the case on either the procedural error[14] or the lack of substantive evidence ground,[15] the holding might be best viewed as a warning to workmen's compensation insurance carriers. As a deterrent to this method of procuring evidence, the appeals board is now simply precluded from relying on evidence so obtained. Second, the use of the word "rely" notwithstanding, the court appeared to be saying something more than that evidence obtained by deceitful inducement is somehow inherently "unreliable," *i.e.* inaccurate, undependable.[16] Acts recorded on film,[17] or even witnessed, do not become less reliable indicia of a claimant's physical capability simply because he does not know he is being scrutinized or because he is doing something he normally would not do absent the inducement. That a claimant's actions, as reproduced on film, do not show convincingly that he is disabled as claimed, goes, as in *Redner,* simply to the weight of such evidence, not to its reliability. Hence, it is submitted that *Redner* laid down an exclusionary rule: if the claimant can establish that he was duped into performing acts which he otherwise would not have done, movies or even eyewitness testimony of such activity will simply not be admitted, regardless of its materiality, probative value, or substance.

Third, the court established new law with respect to California workmen's compensation proceedings. No prior holding of exclusion based on a claim of fraudulent inducement was cited in support of *Redner;* extensive research has failed to disclose such a holding, in California[18] or any other jurisdiction.

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[13]*Id.* at 807.

[14]The court noted that it could annul an appeals board decision only if "it is reasonably probable that, absent the procedural error, the aggrieved party would have attained a more favorable result." *Id.* at 806 n.11. The court found that *Redner* fell under this rule.

[15]The court declared that the appeals board decision would fall on either of two alternatives: "that the board could rely upon the tainted motion picture and the resultant reports or that the board could not do so." *Id.* at 808.

[16]Reliable evidence is "dependable, with reasonable assurance of its probability, as not only truthful but also true." Ohio Real Estate Comm. v. Cohen, 25 Ohio Op. 2d 165, 187 N.E.2d 641, 646 (C.P. 1962).

[17]The court in *Redner* of course had assumed that the movie itself was an accurate reproduction of the incident. See Paradis, *The Celluloid Witness,* 37 U. COLO. L. REV. 235 (1965) for a discussion of the various technical objections that can be made to motion pictures.

[18]The court in *Redner* cited Carson v. Workmen's Comp. App. Bd., 31 Cal. Comp. Cases 291 (Dist. Ct. App. 1966), which involved deceitful inducement quite similar to that

Finally, it is apparent that the exclusionary rule, as decisional law, cannot be applied in any action before a California court. Section 351 of the California Evidence Code[19] provides that all relevant evidence is admissible, except as otherwise provided by statute.[20] "Statute" is defined as including treaties and constitutional provisions.[21] Since the Evidence Code applies to all actions before California courts,[22] it follows that there can be no decisional rules excluding evidence except those which result from interpretations of statutes, treaties, and constitutional provisions which themselves exclude relevant evidence.[23] The *Redner* exclusionary rule is not based upon any statute, but is pure decisional law. Thus, no California court could apply *Redner* in an action before it if the court found that the evidence obtained was indeed relevant.[24]

That the *Redner* decision could not be applied in actions instituted before the state's courts,[25] by virtue of the legislative mandate declaring all relevant evidence to be admissible, puts the court in a position of having laid down an exclusionary rule which, but for the fact that it applies only to workmen's compensation proceedings, would be contrary to that mandate. The question is thus raised: what is it about the nature and purpose of the workmen's compensation law that justifies this kind of exclusion?

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in *Redner*. The claimant alleged a 20%-25% permanent disability due to a back injury, but the referee relied on the carrier's motion picture evidence to reduce her award to 2% permanent disability. The claimant stated that the carrier's investigators had induced her into engaging in various physical exercises at a beach, while she had been drinking, and secretly filmed her activities. Apparently no objection was made to the film's admissibility at the referee's hearing, nor was any objection raised on the claimant's petition for a writ of review, which was denied by the California District Court of Appeal. No appeal was taken to the California Supreme Court. Hence, the carrier's method of procuring the motion picture evidence was not passed upon.

[19]Cal. Stats. 1965, ch. 299, *as amended by* Cal. Stats. 1965, chs. 937, 1151, effective January 1, 1967.

[20]CAL. EVID. CODE § 351 (West 1966). The Law Revision Commission's comment states: "Section 351 abolishes all limitations on the admissibility of relevant evidence except those that are based on a statute, including a constitutional provision." *Id.*, Comment.

[21]*Id.* § 230. Whenever the Evidence Code refers to decisional law as well as statutes, it uses the term "law," which is defined in § 160 as including constitutional, statutory, and decisional law. *Id.* § 160. *See also* McDonough, *The California Evidence Code: A Precis*, 18 HAST. L.J. 89, 90-93 n.8 (1966).

[22]CAL. EVID. CODE § 300 (West 1966).

[23]The same conclusion is reached in McDonough, *The California Evidence Code: A Precis*, 18 HAST. L.J. 89, 91-92 (1966).

[24]*See* CAL. EVID. CODE §§ 300, 351 (West 1966).

[25]The Evidence Code, with certain exceptions which are not relevant to the discussion (*e.g.*, privileges apply to all proceedings in which testimony may be compelled), does not apply to administrative proceedings, which include those before the workmen's compensation appeals board. *Id.* § 300, Comment.

Pointing out that the appeals board is not bound by common law or statutory rules of evidence,[26] but can proceed informally,[27] the *Redner* court, quoting from the workmen's compensation statute,[28] argued that:

> Evidence obtained by fraud and deceit in violation of the rights of the applicant, however, is not "best calculated to ascertain the substantial rights of the parties and carry out *justly* the *spirit* and provisions" of the workmen's compensation laws. The high purposes of the compensation law should not be perverted by resort to evidence perfidiously procured.[29]

The court thus justified its new exclusionary rule in light of the policies which the workmen's compensation laws are designed to promote. Courts have pointed out many benefits of such legislation: the burden of economic loss is shifted from the worker to the industry;[30] both parties avoid costly, formal, time-consuming litigation;[31] the common law rules governing negligence actions are replaced by more appropriate statutory rules.[32]

Pursuant to these policies, the California constitution provides, *inter alia,* that "the administration of such legislation shall accomplish substantial justice."[33] The courts are admonished by statute that the workmen's compensation laws shall be liberally construed.[34] Workmen's compensation, then, can be viewed as a uniform framework directed generally at regulating industry and workers for the benefit of society as a whole.

But it is not exactly clear how these utilitarian aims support an exclusionary rule of evidence. Bald statements[35] of "high purposes" do not

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[26]CAL. LAB. CODE § 5708 (West 1971) provides in part:

> In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division.

[27]French v. Rishell, 40 Cal. 2d 477, 254 P.2d 26 (1953).

[28]CAL. LAB. CODE § 5708 (West 1971).

[29]485 P.2d at 807.

[30]California Comp. Ins. Co. v. Industrial Acc. Comm'n, 128 Cal. App. 2d 797, 276 P.2d 148 (1954). Instead of the individual bearing the burden of lost wages and medical costs, the employer is seen as being in a much better position to absorb the loss by passing it on to the consumer. The "cost" of injuries, then, is simply reflected in the price of the goods produced.

[31]State Comp. Ins. Fund v. Industrial Acc. Comm'n, 20 Cal. 2d 264, 125 P.2d 42 (1942).

[32]*See* Guse v. A.O. Smith Corp., 260 Wis. 403, 51 N.W.2d 24 (1952). The harsh defense of assumption of risk was abolished in favor of the more reasonable rule of liability regardless of fault. Employers, on the other hand, were insulated from unsympathetic juries and their heavy damage awards.

[33]CAL. CONST. art. 20, § 21.

[34]CAL. LAB. CODE § 3202 (West 1971).

[35]The court added as a final observation that "[t]he legal process cannot be stultified by crowning such amoral maneuvers with apparent success." 485 P.2d at 809.

explain why these aims would be "perverted" if the exclusionary rule were not adopted. Insurance carriers are also entitled to "substantial justice." Forcing them to pay compensation in the face of what might be convincing evidence of malingering undermines not only their rights but the same "high purposes" of workmen's compensation which were sought to be protected. The public interest is not benefitted if the payment of compensation in such cases results in increased insurance premiums, the cost of which will ultimately be reflected in higher prices for the consumer. In *Maryland Casualty Co. v. Coker,*[36] the federal court did not inquire into the "high purposes" of the Texas Workmen's Compensation Act, but simply ruled that the motion pictures were admissible even though the claimant had been tricked into his activities. It is tentatively submitted that the *Redner* court's discussion leads only to speculation and confusion about the gap between the specific holding and the broad policy statements, since those policies are equally supportive of valid countervailing considerations not discussed by the court.[37]

If, as has been maintained, an inquiry into workmen's compensation law proves inconclusive as to support for the rationale of the *Redner* decision, an excursion into case law of other jurisdictions may provide a more concrete understanding, either directly or by analogy.

In only two reported cases[38] has the issue of admissibility of a motion picture, in which the plaintiff had been unwittingly induced to perform for the purpose of defeating a disability claim, been raised. In *McGoorty v. Benhart,*[39] plaintiff attempted to show that the woman pictured with him at a driving range, in a rowboat, and playing basketball, was hired by the defendant to solicit these athletic displays and that he would not

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[36]118 F.2d 43 (5th Cir. 1941).

[37]Furthermore, one section of the Labor Code, not mentioned by the court, also points away from exclusionary rules by providing that:

> No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.

CAL. LAB. CODE § 5709 (West 1971). This section is aimed at allowing the appeals board the broadest possible latitude in its evidentiary procedure. It is no doubt of primary benefit to the employee/claimant, but there is no reason why the section cannot be used to the advantage of the employer or insurance company. Indeed, it can be argued that if the board is able to admit evidence which in court would be inadmissible, then, by logical implication, it may admit evidence which in court would be admissible. And, since the two reported cases dealing with motion pictures obtained by deceitful inducement both held that they were admissible under the common law, it would appear that the *Redner* rule comes close to contravening the mandate expressed in § 5709. Maryland Cas. Co. v. Coker, 118 F.2d 43 (5th Cir. 1941); McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E.2d 289 (1940); *see* note 4 *supra.*

[38]Maryland Cas. Co. v. Coker, 118 F.2d 43 (5th Cir. 1941); McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E.2d 289 (1940).

[39]305 Ill. App. 458, 27 N.E.2d 289 (1940).

normally have engaged in them. The court rejected this contention of error rather summarily, saying:

> We do not think it is material what part this girl took in persuading the plaintiff to do what the pictures disclose he did do. The pictures speak for themselves and show that the defendant could do things that he claimed at the trial he could not do. There is no merit in this contention.[40]

In *Maryland Casualty Co. v. Coker*,[41] the defendant introduced films in the trial court purporting to show the plaintiff rowing a boat during a fishing trip. Plaintiff objected partly on the ground that his host, unbeknownst to the plaintiff, was an employee of the insurance company and had enticed him with "female companions and the usual liquid refreshments."[42] The trial judge strongly indicated his disapproval[43] but admitted the films; he later instructed the jury to disregard his remarks. Plaintiff won a judgment on the basis of a permanent disability, and the insurance company appealed, citing the judge's prejudicial remarks as grounds for a mistrial. The circuit court affirmed, finding harmless error and commenting meanwhile on the film:

> Moving pictures taken of a plaintiff in a personal injury suit, which may tend to show he is malingering must usually be taken secretly. On the other hand, when the defendant induces the plaintiff to put himself in a position where such pictures may be taken, the situation is somewhat analogous to entrapment in a criminal case.[44]

The rulings of admissibility in *McGoorty* and *Coker* reflect the well-

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[40]27 N.E.2d at 296.

[41]118 F.2d 43 (5th Cir. 1941).

[42]*Id.* at 44. Plaintiff also denied that he was the one pictured as rowing the boat.

[43]The trial judge's comments in response to the objection to the admission of the films were:

> Well, as to policy I don't approve of the methods employed, but I assume under the general rules of law that the jury is entitled to see the pictures . . . .
>
> . . . I recognize the merit of the objection to the effect that it is violating the sense of fairness, propriety and good morals to take pictures in the way these pictures were allegedly taken.

Id. at 44.

[44]*Id.* at 44. Since plaintiff had won in the district court, the objection to the admissibility of the film was of course not raised in the circuit court. Hence, the circuit court's comments were merely *dicta*. For a discussion of entrapment see text accompanying notes 58-61 *infra*.

established common law rule[45] that if otherwise admissible,[46] all relevant, competent, and material evidence is admissible over any objections of wrongdoing in its procurement.[47]

The recent case of *Sackler v. Sackler*,[48] a divorce action, illustrates the vitality of the admissibility rule. Plaintiff husband and his private investigators illegally broke into the wife's home and obtained direct evidence of adultery. Against the argument that the fourth amendment ban on unreasonable searches, applied to the states via *Mapp v. Ohio*,[49] required the exclusion of the evidence, the court in *Sackler* reasoned that the fourth amendment applied only to governmental searches.[50] With any possible constitutional objection eliminated, the court went on to say that

> no reason remains for holding inadmissible the evidence here presented. The basic rule is that all competent, substantial, credible and relevant evidence is to be available to the courts. The interests of justice will not be promoted by the announcement by the courts of new exclusions, since the process of investigating the truth in courts of justice is an indispensable function of society and since "judicial rules of evidence were never meant to be used as an indirect method of punishment" of trespassers and other lawless intruders [citations omitted]. *Any court is taking extreme measures when it refuses convincing evidence because of the way it was procured.*[51]

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[45]The common law rule has been modified in criminal cases by the development of the exclusionary rule grounded on the fourth amendment protection against unreasonable search and seizure, which began with Weeks v. United States, 232 U.S. 383 (1914) (application to federal courts) and continued through Mapp v. Ohio, 367 U.S. 643 (1961) (application to state courts via due process clause of fourteenth amendment). The rule has been extended to state forfeiture proceedings which, while nominally civil, are really quasi-criminal in nature. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). However, almost all the cases have refused to extend the *Mapp* rule to exclude evidence illegally seized by a *private* party in a *civil* action. *See, e.g.*, Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964); Del Presto v. Del Presto, 97 N.J. Super. 446, 235 A.2d 240 (Super. Ct. 1967). The facts in *Redner* did not raise the issue of illegal search and seizure; the conduct of the carrier might perhaps best be characterized as unethical or unfair.

[46]*E.g.*, not hearsay, privileged, or prejudicial.

[47]*See* Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

[48]15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

[49]367 U.S. 643 (1961). *See* note 45 *supra.*

[50]The New York court cited Burdeau v. McDowell, 256 U.S. 465 (1921), which held that the government could use evidence obtained solely by a private individual, regardless of whether it was procured through an illegal search, since the fourth amendment applied only to sovereign authority. The court in *Sackler* reasoned that the rule in *Burdeau* was still valid. *See* United States v. Goldberg, 330 F.2d 30 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964).

[51]203 N.E.2d at 483 (emphasis added). *Accord*, Del Presto v. Del Presto, 97 N.J. Super. 446, 235 A.2d 240 (Super. Ct. 1967); State Forester v. Umpqua River Navigation Co., ___ Ore. ___, 478 P.2d 631 (1970). *Contra*, Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (C.P. 1966).

Sackler points up three important policies underlying the admissibility rule: (1) the court seeks to establish the truth as it relates to and settles the issues directly before it; (2) the court is interested primarily in the issues before it—unnecessary collateral attacks on the evidence will unduly complicate and delay the litigation; and (3) civil litigants wronged by improper or illegal evidence-gathering methods have direct remedies in tort law,[52] whereas the fourth amendment exclusionary rule was seen as the only effective protection that one criminally accused had against illegal methods of law enforcement.[53]

Since the methods used in *Redner* appear to fall short of an unreasonable search and seizure, the policies supporting admissibility which stood up in *Sackler* weigh most heavily against the *Redner* court's findings of "deceitful conduct"[54] and "amoral maneuvers."[55]

But it may be argued that the reasoning of *Sackler* is distinguishable from *Redner* because the latter involved the element of deceitful inducement in an effort to create evidence that normally would not have existed but for the manipulation by the insurance company. The court in *Redner* seemed to invoke the principle that no man shall take advantage of his own wrong,[56] saying that "the carrier should not profit from its own deceitful conduct."[57] The court in *Coker* suggested that in such a case an analogy might be drawn to criminal entrapment.[58]

If such an analogy could be maintained, the rationale underlying criminal entrapment might lend support to the holding in *Redner*. The defense of criminal entrapment must first be predicated on government action. Purely private inducement to criminal activity has never been sufficient to constitute a defense.[59] The conduct sought to be deterred in *Redner* was private, thus weakening the comparison. Moreover, the theory of entrapment is based on the idea that the courts will not find guilt in conduct

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[52]*See* note 66 *infra*.

[53]Courts have held that to refer an accused, regardless of a subsequent conviction on the basis of the illegally seized evidence, to an action in trespass against a policeman was to give him no remedy or protection at all. Only an absolute exclusionary rule could deter the police. *See* State Forester v. Umpqua River Navigation Co., ___Ore. ___, 478 P.2d 631 (1970).

[54]485 P.2d at 807.

[55]*Id.* at 809.

[56]Lightbody v. Russell, 45 N.Y.S.2d 15 (Sup. Ct. 1943).

[57]485 P.2d at 807.

[58]118 F.2d 43 (5th Cir. 1941). *See* text accompanying notes 41-44 *supra*.

[59]United States v. DeAlesandro, 361 F.2d 694 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966); United States v. Comi, 336 F.2d 856 (4th Cir. 1964), *cert. denied*, 379 U.S. 992 (1965); People v. Gregg, 5 Cal. App. 3d 502, 85 Cal. Rptr. 273 (1970).

which has been manufactured by the police.[60] The situation in *Redner* is analytically distinguishable: the insurance company was not "prosecuting" or complaining of Redner's conduct—horseback riding—as wrongful, but it wished instead to use that conduct only as evidence bearing on the central issue of disability.

Since criminal entrapment is bound up with concepts of guilt and government conduct, a more illuminating analogy might be found in the doctrine of connivance.[61] A type of civil entrapment, this defense to a divorce action on grounds of adultery provides a direct contrast to the divorce case in *Sackler.* If a husband, as in *Fonger v. Fonger,*[62] hires an investigator not only to spy on his wife but to entice her into adultery, the husband will not be heard to complain of her wrong, since he is the causal force behind the acts of his agent.[63] The rationale is clear: having caused his wife to commit a wrong, the husband cannot then complain of her conduct and seek relief upon it. Note that the wife's adulterous act, in an objective sense, remained adulterous. Yet its culpability was diminished, even excused, in light of the husband's manipulation; its *legal* effect was rendered a nullity because, the court could reason, "but for" the husband's wrong, there would be no reason to come to court. In *Sackler,* too, the husband complained of adultery. But he was not the "cause" of the wrong; her adulterous act was in no way diminished by his illegal entry. Were his wrongful conduct taken away, there would still remain the wife's wrong, with only a problem of proof to give it legal effect. The wrong in *Sackler* went simply to the procurement of evidence of the wife's conduct; the latter remained the central issue in the case.

The central issue in *Redner* was the physical condition of the claimant. The insurance company asserted that the claimant was healthy. If it can be argued in *Fonger* that the wife would have been faithful but for the connivance of the husband, it cannot likewise be said that Redner would have remained disabled but for the deceitful conduct of the insurance company. The analogy breaks down, for the most that can be said is that the carrier had "caused" evidence bearing on disability to come into existence. If the carrier's deceitful conduct were taken away, the central issue of disability would nevertheless remain in the case.

Hence, it is not clear precisely how the carrier would "profit from its

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[60]Sherman v. United States, 356 U.S. 369 (1958). For a discussion of the majority and concurring opinions as to the theory underlying the defense, see Note, *Entrapment,* 73 HARV. L. REV. 1333 (1960).

[61]The defense is complete when the libellee shows that the libellant has by some affirmative act facilitated the commission of adultery. Hayden v. Hayden, 326 Mass. 587, 96 N.E.2d 136 (1950).

[62]160 Md. 610, 154 A. 443 (1931).

[63]*Id.*

own deceitful conduct"[64] in the sense of "causing" a wrong to occur to its own interests and then seeking legal relief based on that wrong. The court's implication was that the carrier should not profit by withholding its payments, regardless of its case on the merits as to whether the claimant was injured or healthy. Such a punitive rule, it is submitted, has no place in the "high purposes" of the workmen's compensation law, nor is the public served by eventually having to bear the cost of unnecessary and undeserved compensation payments.

In examining the *Redner* decision in the context of workmen's compensation law and California statutes, and in juxtaposition with other important cases, such as *Sackler,* one salient question has emerged: how should courts curb the conduct of a litigant which, although unethical and possibly illegal, nevertheless is only collaterally relevant to the substantive issue before them? *Redner* seemed to indicate that the choice was between allowing the legal process to "be stultified by crowning such amoral maneuvers with apparent success"[65] and laying down a rule that is both punitive and absolutely exclusionary as to possibly valuable evidence. The policies behind the exclusionary rule in *Mapp* may simply be insufficient to support such exclusion in private, civil litigation. And if the admissibility policy behind *Sackler* can withstand a constitutional attack, then it would seem that a ruling of admissibility in *Redner* and a straightforward decision on the merits would also have stood for the integrity of the fact-finding process.

To conceptualize the problem in the above polarities was to miss the objective balance of a middle course: neither approve nor punish conduct merely collateral to the issue at hand. Instead, if the claimant indeed feels that his privacy has been intruded upon,[66] let him proceed separately on that cause of action. Only then will the issue of the insurance company's "fraudulent inducement" and "deceitful conduct" truly be before the courts. If substantial compensatory and even punitive damages are allowed, an effective and legally sound deterrent will be established.

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[64]485 P.2d at 807.

[65]*Id.* at 809.

[66]The court alluded to this possibility by indicating that "the referee found that the carrier fraudulently obtained the film by means of a violation of applicant's rights." *Id.* at 807. The court suggested that such tactics may give rise to a suit for invasion of privacy on the theory of an intrusion considered unreasonable to an ordinary man. *See* Prosser, *Privacy,* 48 CALIF. L. REV. 383, 390-91 (1960); Alabama Elec. Co-op., Inc. v. Partridge, 284 Ala. 442, 225 So. 2d 848 (1969); Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).