

THE COMPENSABILITY OF MENTAL INJURIES UNDER VERMONT'S WORKERS' COMPENSATION ACT

INTRODUCTION

The goal of Vermont's Workers' Compensation Act¹ is to compensate employees who have been disabled by accidents "arising out of and in the course of . . . employment."² Although compensable disablements have traditionally been physical in nature,³ Vermont is beginning to expand the Act's coverage to include disablements of a nonphysical nature.⁴ The leading proponent of this expansive reading of the Act has been the Commissioner of the Department of Labor and Industry, who is empowered to adjudicate workers' compensation claims.⁵ This note will examine the legislative, administrative, and judicial influences upon the emergence of compensation for mental injuries under Vermont's Act. The emergence of mental injury compensation has produced numerous issues in need of consideration, including the illusory legislative intent to compensate mental injuries, the evidentiary problems inherent in such cases, and the lack of medical authority addressing work-related mental injury cases. These issues will be addressed and analyzed in order to determine the compensability of mental injuries under Vermont's Workers' Compensation Act.

I. HISTORICAL BACKGROUND

Workers' compensation in America emerged as a byproduct of the American Industrial Revolution. The first two decades of the twentieth century witnessed comprehensive political reform,⁶ part of which responded to the increase of work-related injuries suffered by the working class. Prior to the workers' compensation acts, injured employees recovered against negligent employers through common law tort actions.⁷ This type of action carried no

1. VT. STAT. ANN. tit. 21, §§ 601-709 (1978 & Supp. 1982).

2. *Id.* § 618 (1978).

3. See *infra* notes 33-35 and accompanying text.

4. See *infra* text accompanying notes 89-100.

5. VT. STAT. ANN. tit. 21, §§ 606, 664 (1978).

6. H. PARKES, *THE UNITED STATES OF AMERICA—A HISTORY* 543 (3d ed. 1968).

7. Interview with Grant Gilmore, Professor of Law at Vermont Law School, South Royalton, Vt. (Feb. 26, 1982) [hereinafter cited as Gilmore]; see also Nyhan, *The Relationship Between The Tort System & Workers' Compensation*, in NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST—CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 57-58

limitation upon the amount of recovery an employee could receive.⁸ Although this approach appears one-sided, the employer could successfully counter such tort actions by utilizing the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule.⁹

In the early 1900's, an interest group, characterizing its members as "progressionists," lobbied successfully for the statutory adoption of a compensation plan for work-related injuries.¹⁰ The resultant statutes purported to protect the working class by requiring employers to obtain compulsory insurance coverage to compensate employees for injuries incurred during employment.¹¹ The acts have been characterized as a "trade-off" between employers and employees: in return for employees' relinquishment of tort claims which oftentimes resulted in large awards, the employers waive their common law defenses.¹² Thus the statutes provide an exclusive remedy to the injured employee.¹³

Vermont's original Workmen's Compensation Act was enacted in 1915.¹⁴ The statute was modeled after the British Workmen's Compensation Act.¹⁵ Early case law interpreting the Vermont statute's provisions reflected the motivations of progressive political reform which led to the statute's enactment. For example, it has been noted that the Act "rests on the economic and humanitarian principle of compensation to the employee, at the expense of the business, . . . for earning capacity destroyed by an accident in the

(1981) [hereinafter cited as Nyhan].

8. Gilmore, *supra* note 7; Nyhan, *supra* note 7, at 57 ("right to the full gamut of common law damages").

9. Gilmore, *supra* note 7; see also Nyhan, *supra* note 7, at 57-58.

10. Gilmore, *supra* note 7. Professor Gilmore noted that this shift in balance from common law remedies to statutory remedies was part of the most fundamental change to occur in the American legal system during the past 100 years.

11. HON. C. SUTHERLAND, COMPULSORY WORKMEN'S COMPENSATION LAW, S. Doc. No. 131, 63d Cong., 1st Sess. 9 (1913).

12. Gilmore, *supra* note 7; Nyhan, *supra* note 7, at 58. "The three wicked sisters of contributory negligence, fellow servant, and assumption of risk, were stricken from the employers' arsenal of defenses." *Id.*

13. VT. STAT. ANN. tit. 21, § 622 (1978). "The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter shall exclude all other rights and remedies of such employee . . . at common law or otherwise on account of such injury." *Id.*

14. 1915 Vt. Acts No. 164 (An Act Relating To Compensation To Employees For Personal Injuries).

15. *Giguere v. Whiting Co.*, 107 Vt. 151, 157, 177 A. 313, 316 (1935).

course of, or connected with, his work."¹⁶ This remedial statute¹⁷ was intended to be liberally interpreted to accomplish its humanitarian purpose.¹⁸ Thus, the statute's language and intent should be interpreted in light of its historical background.

II. VERMONT'S WORKERS' COMPENSATION ACT

A. *Compensation Procedure*

The current version of Vermont's Workers' Compensation Act provides:

If a worker receives a personal injury by accident arising out of and in the course of his employment by an employer subject to this chapter, his employer or the insurance carrier shall pay compensation in the amount and to the person hereinafter specified.¹⁹

When an employee receives a disabling work-related injury, the mechanics of the compensation procedure are set in motion. The employer is required to file notice with the Commissioner describing the circumstances surrounding the injury.²⁰ Compensation is due if the injury falls within the purview of the statutory language set out above. When there is no factual dispute over whether compensation is due under the Act, the employer and employee are allowed to enter into a private settlement.²¹ No private settlement, however, is valid until the Commissioner verifies that the settlement is within the statutory minimum compensation levels.²²

If the parties are unable to enter into a mutually satisfactory agreement, either party may apply to the Commissioner for a hearing to determine whether, and in what amount, compensation is

16. *Brown v. Bristol Last Block Co.*, 94 Vt. 123, 128, 108 A. 922, 924 (1920). *Accord Bundy v. State of Vermont Highway Dep't*, 102 Vt. 84, 87, 146 A. 68, 69 (1929).

17. *Gilmore*, *supra* note 7.

18. *Wilkins v. Blanchard-McDonald Lumber Co.*, 115 Vt. 89, 92, 52 A.2d 781, 783 (1947). *See also Giguere v. Whiting Co.*, 107 Vt. 151, 164, 177 A. 313, 319 (1935); *Brown v. Bristol Last Block Co.*, 94 Vt. 123, 128, 108 A. 922, 924 (1920). *Accord Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 33, 268 N.W.2d 1, 14 (1978).

19. VT. STAT. ANN. tit. 21, § 618 (1978).

20. *Rules Pertaining to Vermont's Workmen's Compensation and Occupational Disease Law*, § 9, reprinted in VERMONT WORKMEN'S COMPENSATION LAW 107 (1978).

21. VT. STAT. ANN. tit. 21, § 662 (Supp. 1982).

22. *Id.* This section, however, gives the Commissioner discretion to approve an agreement at variance with the statutory provisions. *Id.*

due.²³ In order to recover compensation at the hearing, the claimant must prove that his injury comes within the scope of the Act.²⁴ At the hearing, the Commissioner's hearing officer listens to arguments from both sides, and makes a determination based on the evidence.²⁵ An adjudication is equivalent to a court judgment.²⁶

When either party is unsatisfied with the ruling, an appeal may be taken within 30 days to the superior court within the county where a civil action between the parties would be heard.²⁷ When an appeal is not taken within 30 days, either party may transfer the case directly to the Vermont Supreme Court. The scope of judicial review in an appeal is limited to questions of law certified by the Commissioner.²⁸ The courts will uphold the administrative ruling unless there is insufficient evidence to support the legal conclusions.²⁹ The findings are reviewed so that deference is given to the prior administrative determination.³⁰ Once settlement or litigation has unquestionably established an injury with resulting disability, compensation is awarded. The compensation period continues until the employer can prove that the disability has reached a medical end result.³¹

B. *Interpreting the Workers' Compensation Act*

Litigation under the statute is dominated by conflicting interpretations of three of its clauses: "personal injury," "by accident," and "arising out of and in the course of his employment." Current interpretation of these three clauses requires close examination to determine their applicability to mental injury cases.

23. *Id.* §§ 606, 663 (1978).

24. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395, 406 A.2d 390, 391 (1979). See also *infra* text accompanying notes 146-50.

25. The commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as provided in this chapter, but he may make such investigation or inquiry or conduct such hearings or trial in such manner as to ascertain the substantial rights of the parties.

Vt. STAT. ANN. tit. 21, § 604 (1978).

26. *Wilkens v. Blanchard-McDonald Lumber Co.*, 115 Vt. 89, 90, 52 A.2d 781, 782 (1974) (citations omitted).

27. Vt. STAT. ANN. tit. 21, § 670 (1978).

28. *Id.* § 672 (1978).

29. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395, 406 A.2d 390, 391 (1979).

30. *Wilkins v. Blanchard-McDonald Lumber Co.*, 115 Vt. 89, 90, 52 A.2d 781, 782 (1947) (citation omitted).

31. *Merrill v. University of Vermont*, 133 Vt. 101, 105, 329 A.2d 635, 637 (1974) (citing *Soucy v. Fraser Paper, Ltd.*, 267 A.2d 919 (Me. 1970)).

1. "Personal Injury"

The complete definition of "personal injury" in the Act is as follows: "Injury" and "personal injury" includes death resulting from injury within two years and includes injury to and cost of acquiring and replacement of prosthetic devices, hearing aids and eyeglasses."³² This definition is hardly adequate to determine the scope of "personal injury." The Legislature has apparently left the construction of the term "personal injury" for the courts.

The traditional court-adjudicated compensation awards have been for work-related injuries and disabilities which have been *physical* in nature.³³ Although administrative interpretations of the Workers' Compensation Act have placed mental injuries within the parameters of "personal injury,"³⁴ the Vermont Supreme Court has never been presented with the direct issue of whether compensation could be awarded *solely* on the grounds of mental injuries.³⁵ The Legislature has expressed its desire to have the Act interpreted and construed in uniformity with the law of other states that have enacted workers' compensation laws.³⁶ This legislative directive allows interpretations of "personal injury" found in other jurisdictions to be persuasive authority.³⁷

Professor Larson has noted that personal injury "need not involve physical trauma, but may include such injuries as disease, sunstroke, nervous collapse, traumatic neurosis, hysterical paralysis, and neurasthenia."³⁸ Until the past few decades, courts

32. VT. STAT. ANN. tit. 21, § 601(7) (1978).

33. For example, compensation has been awarded for compression fracture of the vertebra, *Merrill v. University of Vermont*, 133 Vt. 101, 329 A.2d 635 (1974); back injuries, *Wilkins v. Blanchard-McDonald Lumber Co.*, 115 Vt. 89, 52 A.2d 781 (1947); hernia, *Giguere v. Whiting Co.*, 107 Vt. 151, 177 A. 313 (1935); for being trampled to death by horses, *Brown v. Bristol Last Block Co.*, 94 Vt. 123, 108 A. 922 (1920).

34. See *infra* text accompanying notes 89-100.

35. The court has sustained, however, the continuance of compensation where the employer admitted that a physical injury had occurred and where the court finds that although physical injury had dissipated, subjective pain remained. *Merrill v. University of Vermont*, 133 Vt. 101, 329 A.2d 635 (1974).

36. VT. STAT. ANN. tit. 21, § 709 (1978).

37. To complement this authorization, it should be remembered that the "act should be a liberal and reasonable construction. It is framed on broad principles for the protection of the workman." *Brown v. Bristol Last Block Co.*, 94 Vt. 123, 128, 108 A. 922, 924 (1920). *Accord* *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 33, 268 N.W.2d 1, 14 (1978). "There exists a frequently quoted maxim or 'rule of construction' to be applied by courts in interpreting remedial legislation such as workers' compensation acts: *remedial legislation should be construed liberally.*" *Id.* (emphasis in the original).

38. 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.00 at 7-575 (1981).

shunned the idea of compensating mental injuries.³⁹ This was due to a combination of ignorance, misunderstanding, and lack of concrete medical evidence establishing a causative link between work-related trauma and resultant mental injury.

Recognition of the compensability of mental injury, however, has found wide acceptance in other jurisdictions.⁴⁰ Physical injury caused by physical stimulus and mental injury caused by physical trauma both have been widely compensated. Larson also cites numerous cases where compensation was awarded when mental injury was caused by mental trauma.⁴¹ Against this backdrop, a sampling of the supporting jurisdictions clearly shows the inclusion of mental injuries within the parameters of the "personal injury" clause.

In Massachusetts, a significant case concerning workers' compensation awards for mental injury is *In re Fitzgibbons*.⁴² Mr. Fitzgibbons was employed by the state as a supervisory corrections officer at a state house of correction. During a fracas with inmates, Fitzgibbons ordered officers to segregate a disruptive inmate. One of the officers involved "became ill" and died as a result. (The record does not indicate the fatal illness involved.) Fitzgibbons, upon hearing of the officer's death, became emotionally disturbed. He was hospitalized and diagnosed as having an acute anxiety reaction, requiring medication. Throughout this treatment period, Fitzgibbons suffered withdrawal and guilt anxiety. The stress culminated to the point where Fitzgibbons fatally shot himself.

Fitzgibbons' widow was awarded workers' compensation by the state's Industrial Accident Board. The state, as the employer, appealed to the Supreme Judicial Court upon the issue of whether the Massachusetts' workers' compensation statute included mental injuries within the "personal injury" definition.⁴³ In construing the term "personal injury," the Supreme Judicial Court recognized that the remedial statute was intended to be interpreted liberally to further the policy of providing relief to employees suffering work-related injuries.⁴⁴ In light of this foundation, the court de-

39. *Id.* § 42.22 at 7-611.

40. *Id.* § 42.20 at 7-584.

41. *Id.* §§ 42.22 at 7-597, 42.23 at 7-624. Extensive citation to cases holding both for and against compensation is listed within these sections.

42. 374 Mass. 633, 373 N.E.2d 1174 (1978).

43. *Id.* at 634, 373 N.E.2d at 1175.

44. *Id.* at 637, 373 N.E.2d at 1176-77 (citing *Burns's Case*, 218 Mass. 8, 12, 105 N.E.

cided that "personal injury" includes mental injury. Specifically, the court noted that personal injury includes "whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability."⁴⁶

In a New Jersey case, *Simon v. R.H.H. Steel Laundry, Inc.*,⁴⁶ the claimant sought compensation for a disabling psychoneurosis caused when high pressure steampipes burst in the boiler room where he worked.⁴⁷ An issue, *inter alia*, was whether the workers' compensation statute's definition of "personal injury" included disabling psychoneurosis. Deciding for the claimant, the court noted that "the statutory basis for a compensation award is an 'injury' and there is nothing in the law to exclude from the import of this term such injuries as result from nonphysical, that is, psychic, trauma."⁴⁸

New York also found that mental injury falls within its workers' compensation statute's "personal injury" clause. In *Wolfe v. Sibley, Lindsay & Curr Co.*,⁴⁹ the court of appeals reversed the appellate division's denial of compensation. The employee claimed to be suffering from an acute depressive reaction after finding her boss fatally injured from a self-inflicted gunshot wound. The court based its opinion upon two considerations. First, the court noted that the vulnerability levels of different individuals to deal with stressful situations varied considerably.⁵⁰ As an example, the court explained that a stressful situation may cause a heart attack in one individual, while causing a depressive reaction in another.⁵¹ The court stated that both cases require compensation under the Act, for in each case, "the result is the same—the individual is incapable of functioning properly because of an accident."⁵² Secondly, the court believed the "personal injury" clause should not be deemed

601, 603 (1914)).

45. *In re Fitzgibbons*, 374 Mass. at 637, 373 N.E.2d at 1177. "There is no valid distinction which would preclude mental or emotional disorders caused by mental or emotional trauma from being compensable." *Id.* at 637-38, 373 N.E.2d at 1177 (citing *Caswell's Case*, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940); *McMurray's Case*, 331 Mass. 29, 32, 116 N.E.2d 847, 847 (1954); 1A A. LARSON, WORKMEN'S COMPENSATION § 42.23 (1973)).

46. 25 N.J. Super. 50, 95 A.2d 446 (1953) (*aff'd* 26 N.J. Super. 598, 98 A.2d 604 (1953)).

47. *Id.* at 53, 95 A.2d at 447.

48. *Id.* at 59, 95 A.2d at 450.

49. 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975).

50. *Id.* at 510, 330 N.E.2d at 606, 369 N.Y.S.2d at 641.

51. *Id.* 330 N.E.2d at 606, 369 N.Y.S.2d at 641-42.

52. *Id.*, 330 N.E.2d at 606, 369 N.Y.S.2d at 641.

to include *only* physical injury, for psychological injuries could be reliably identified and causally linked to job-related accidents: "There is nothing talismanic about physical impact."⁵³

The distinct shift toward awarding compensation for mental injury suffered during employment is due to an increasing acceptance by the legal profession of the interrelationship of the physical and mental functions of the human body. This understanding is evidenced in Texas as follows:

The phrase "physical structure of the body," as it is used in the statute, must refer to the *entire* body, not simply to the skeletal structure or its circulatory system or to the digestive system. It refers to the *whole*, to the complex of perfectly integrated and interdependent bones, tissues and organs which function together by means of electrical, chemical and mechanical processes in a living, breathing, functioning individual.⁵⁴

In summation, the Vermont Workers' Compensation Act is to be interpreted uniformly with other workers' compensation acts.⁵⁵ The authorities and doctrines outlined above suggest that mental injuries can be included within the Vermont Act's "personal injury" clause.

2. "By Accident"

The language of section 618 of the Act restricts compensation to those work-related injuries received "by accident."⁵⁶ In mental injury cases, the causal link between the injury and a job-related accident poses difficult evidentiary problems.⁵⁷ Given the fact that different people cope with trauma in different ways,⁵⁸ it is difficult in mental injury cases to determine what events lead to the manifestation of mental injury. For this reason, the case law interpreting

53. *Id.*, 330 N.E.2d at 606, 369 N.Y.S.2d at 642.

54. *Bailey v. American Gen. Ins. Co.*, 154 Tex. 430, 435, 279 S.W.2d 315, 318 (1955). See also *Larson, Mental and Nervous Injury in Workmen's Compensation*, 23 VAND. L. REV. 1243, 1260 (1970).

55. See *supra* text accompanying note 36.

56. VT. STAT. ANN. tit. 21, § 618 (1978). See also *Masterson v. Rutland Hosp., Inc.*, 129 Vt. 91, 92, 271 A.2d 848, 849 (1970).

57. See *infra* text accompanying notes 135-53. Compare *Merrill v. University of Vt.*, 133 Vt. 101, 104, 329 A.2d 635, 637 (1974) with *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 28-30, 268 N.W.2d 1, 12 (1978).

58. See *Kasl, The Challenge of Studying the Disease Effects of Stressful Work Conditions*, 71 AM. J. OF PUB. HEALTH 682, 682-83 (1981) [hereinafter cited as *Kasl*].

the "by accident" clause is relevant to the mental injury issue.

As the historical background of workers' compensation indicates, the Vermont Act was adopted and modeled after the British Act.⁵⁹ Interpretation of the statutory phrase "by accident" has not changed significantly since the English courts' interpretation of the phrase in the British Act was adopted by Vermont in *Giguere v. Whiting Co.*⁶⁰ In *Giguere*, the court noted that the expression "accident" was to be construed "in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."⁶¹

The recent case of *Campbell v. Heinrich Savelberg, Inc.*⁶² expanded the meaning of the "by accident" clause and modified the previous interpretation in *Masterson v. Rutland Hospital, Inc.*⁶³ In *Masterson*, the claimant nurse was denied compensation when she suffered pulmonary tuberculosis which she contracted while in the employ of the defendant hospital. In support of its decision to deny compensation, the *Masterson* court stated that the "by accident" clause did not include an injury contracted over an extended period of time.⁶⁴ The court established the rule that in order for an injury to be "by accident" and compensable under the Act, the injury had to be the result of a "fortuitous event."⁶⁵ This rule would increase the present difficulty in compensating mental injuries, since many mental injuries cannot be traced to a single event.⁶⁶ The *Campbell* decision, however, relaxed the *Masterson* single "fortuitous event" rule.

In *Campbell*, the claimant worked for the defendant as a carpenter. In the course of his employment, the claimant was required to work in an unventilated area which was heavily exposed to paint and varnish fumes. After working under these conditions for a number of weeks, the claimant experienced chest pains; he completed his day's work and only then reported to his doctor. While being examined, the claimant suffered a cardiac arrest.⁶⁷

59. See *supra* text accompanying notes 6-18.

60. 107 Vt. 151, 177 A. 313 (1935).

61. *Id.* at 164, 177 A. at 319. See also *Lapan v. Berno's Inc.*, 137 Vt. 393, 395, 406 A.2d 390, 391 (1979); *Masterson v. Rutland Hosp., Inc.*, 129 Vt. 91, 92, 271 A.2d 848, 849 (1970).

62. 139 Vt. 31, 421 A.2d 1291 (1980).

63. 129 Vt. 91, 271 A.2d 848 (1970).

64. *Id.* at 92, 271 A.2d at 850.

65. *Id.*

66. *Kasl, supra* note 58, at 683.

67. 139 Vt. at 34, 421 A.2d at 1293.

The case was brought for hearing before the Commissioner because the employer claimed the injury was not caused by an accident which transpired during employment. The Commissioner denied compensation, citing *Masterson* for the rule that compensation would not be awarded where a single fortuitous event could not be established.⁶⁸ On appeal to the Vermont Supreme Court, the issue was whether the evidence of personal injury by accident constituted a claim within the meaning of the Act.⁶⁹ Expert testimony established that the paint and varnish fumes irritated the bronchial tubes of the claimant, causing severe swelling and acute bronchitis, which "diminished the supply of oxygen to the heart and brought on the myocardial infarction. In short, the human frame broke down unexpectedly under work-related strain."⁷⁰ The court found that this constituted a personal injury by accident under the Act.⁷¹ Although the claimant had a history of arteriosclerosis and mild chronic bronchitis prior to his accident, the court noted that this does not bar recovery: "We have long held that the aggravation or acceleration of a pre-existing condition can constitute a personal injury by accident under the Act."⁷²

The facts of *Campbell* indicate that the claimant had been exposed to the fumes over a period of working days. Under the *Masterson* rule, the claimant probably would not have been able to recover compensation. In response to the *Masterson* rule, the court said:

We have previously relied on the absence of a brief and fortuitous event to deny compensation, see *Masterson* . . . , but in *Masterson* the claimant contracted tuberculosis after nine months of exposure under normal working conditions. Any reading of *Masterson* to require a brief event would therefore rely on dicta, which we now disapprove. "[I]njury, to be accidental, need not be instantaneous." . . . In light of this, we find that four to six weeks of exposure to intense fumes is a sufficiently specific trauma to constitute an acci-

68. Interview with Josh Fitzhugh, Hearing Officer for the Vermont Dep't of Labor & Industry, Montpelier, Vt. (Oct. 8, 1981).

69. 139 Vt. 31, 35, 421 A.2d 1291, 1293-94 (1980). The case initially was appealed to the Windsor County Superior Court which reversed the Commissioner and allowed compensation to issue. The employer appealed the decision in accordance with VT. STAT. ANN. tit. 21, § 672 (1978). 139 Vt. 31, 421 A.2d 1291 (1980).

70. 139 Vt. at 35, 421 A.2d at 1294.

71. *Id.*

72. *Id.* at 35-36, 421 A.2d at 1294.

dent under the Act.⁷³

Thus, according to Vermont's recent case law, an "accident" is deemed to occur where injury arises from an unlooked-for mishap or an untoward event which is not expected or designed, and which may occur by a single fortuitous event or by exposure to some injurious situation for up to, at least, four to six weeks. This approach is favorable to the mental injury cases where it is often difficult to trace the injury to a single accident because the injury may result from exposure to a continuing injurious situation.

3. Injury "Arising Out Of And In The Course Of Employment"

The early test for whether an injury "arises out of and in the course of employment" was established in *Bundy v. State of Vermont Highway Department*⁷⁴ in 1929. The test was that "[t]he rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment, and not by any other agency."⁷⁵ The *Bundy* court further stated that this test required consideration of two separate issues: first, did the injury arise out of the employment, and second, was the injury received in the course of employment:

Speaking generally an injury arises in the course of the employment when it arises within the period of employment, at a place where the employee may reasonably be, and when he is reasonably fulfilling the duties of his employment; and an injury arises out of an employment when it occurs in the course of it and as the proximate result of it. . . . But in any event, the causal connection between the injury and the employment must be established.⁷⁶

The development of the court's construction of the "arising out of and in the course of employment" clause holds particular interpretative value in mental injury cases. The case law in this area shows a definite shift away from the strict and limited interpretation of the clause to a reading which more nearly reflects the remedial purpose of the statute.⁷⁷

73. *Id.* at 36, 421 A.2d at 1294 (1980) (quoting 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 39.20, at 7-304 (1980)).

74. 102 Vt. 84, 87, 146 A. 68, 69 (1929).

75. *Id.* at 87, 146 A. at 69.

76. *Id.* at 88, 146 A. at 70. See also *Rothfarb v. Camp Awanee, Inc.*, 116 Vt. 172, 176, 71 A.2d 569, 572 (1950).

77. The statute itself contains a provision that "[i]n a construing the provisions of this

In *Burton v. Holden & Martin Lumber Co.*,⁷⁸ an employee's widow sought compensation for the death of her husband. Burton suffered a sliver in his thumb while working in the defendant's lumber yard. Shortly after being treated for infection, Burton suffered various ailments which fatally culminated in cerebral thrombosis. The Vermont Supreme Court held that the claimant failed to prove that the death was the result of an accident arising out of and in the course of employment.⁷⁹ Although the claimant presented medical testimony that the infection resulting from the sliver *could* have caused the death, the court ruled that "[t]here must be created in the mind of the trier something more than a possibility, suspicion or surmise that such was the cause, and the inference from the facts proved must be at least the more probable hypothesis, with reference to the possibility of other hypotheses."⁸⁰ The *Burton* decision was modified in 1974 by *Merrill v. University of Vermont*.⁸¹

In *Merrill*, the plaintiff suffered a work-related injury when she fell and fractured a vertebra. The defendant employer, after a period of compensation, sought to extinguish the benefit payments made to Merrill because her inability to return to work was largely due to resultant pain, not physical injury. After acknowledging the fact that Merrill's pain "was a subjective thing,"⁸² the court modified the *Burton* rule.⁸³ In allowing the continuance of compensation after the claimant had reached a medical end result but still suffered from the resultant pain, the court noted: "Since medical testimony indicated the *possibility* that the pain was too great to allow plaintiff to go back to work, the trial court had reason to credit plaintiff's own testimony."⁸⁴ Furthermore, the court noted that when a condition is subjective in nature, testimony of the claimant suffering the condition will, by itself, be sufficient to award compensation where the trial court can rule on the credibility of the testimony.⁸⁵

chapter, the rule of law that statutes in derogation of the common law are to be strictly construed shall not be applied." VT. STAT. ANN. tit. 21, § 709 (1978).

78. 112 Vt. 17, 20 A.2d 99 (1941).

79. *Id.* at 22, 20 A.2d at 101.

80. *Id.* at 20, 20 A.2d at 100.

81. 133 Vt. 101, 329 A.2d 635 (1974).

82. *Id.* at 104, 329 A.2d at 637.

83. *Id.* at 104-06, 329 A.2d at 637-38.

84. *Id.* at 106, 329 A.2d at 638.

85. *Id.* at 105-06, 329 A.2d at 637-38.

The court's acceptance of the compensability of a subjectively measured injury, as noted in *Merrill*, reflects the trend found elsewhere.⁸⁶ A claimant must still satisfy the "arising out of and in the course of employment" test as expressed in *Bundy v. State of Vermont Highway Department*.⁸⁷ But where it is established by expert medical testimony that the injury is subjective in nature, such as a mental injury, and was possibly caused by the work-related accident, then the claimant's own testimony, if found credible, will apparently be sufficient by itself to be the basis of an award.

III. THE EMERGENCE OF MENTAL INJURY AWARDS

Recovery for mental injuries under Vermont's Workers' Compensation Act is a very recent phenomenon. The Vermont Supreme Court has never considered the issue of whether compensation could be awarded solely on the ground of mental injury. In *Merrill v. University of Vermont*,⁸⁸ however, the court sustained the continuance of compensation where the employer admitted that a physical injury had dissipated, but subjective pain (mental injury) remained.⁸⁹ Although the supreme court has not dealt directly with a claimant seeking compensation for work-related mental injury, the Commissioner of the Department of Labor and Industry has confronted the issue.

In *Ouellet v. Department of Corrections*,⁹⁰ the claimant was a correctional officer at the St. Albans Correctional Facility. In Sep-

86. See, e.g., *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 26, 268 N.W.2d 1, 11 (1978):

We hold, as a matter of law, that in cases involving mental (including psychoneurotic or psychotic) injuries, once a plaintiff is found disabled and a personal injury is established, it is sufficient that a strictly subjective causal nexus be utilized by reference and the WCAB [Workers' Compensation Appeal Board] to determine compensability. Under a "strictly subjective causal nexus" standard, a claimant is entitled to compensation if it is factually established that claimant honestly perceives some personal injury incurred during the ordinary work of his employment "caused" his disability. This standard applies where the plaintiff alleges a disability resulting from either a physical or mental stimulus and honestly, even though mistakenly, believes that he is disabled due to that work-related injury and therefore cannot resume his normal employment.

(emphasis added). See also 1B A. LARSON, WORKMEN'S COMPENSATION LAW §§ 42.20-42.23 (1982).

87. 102 Vt. 84, 146 A. 68 (1929).

88. 133 Vt. 101, 329 A.2d 635 (1974).

89. See *supra* text accompanying notes 81-85.

90. No. N 16408 (Hearing before the State Board on State Employee's Benefits, 1980).

tember of 1977, the claimant was verbally and physically assaulted by an inmate and received minor injuries to his face and rib cage. The inmate threatened the claimant and his family. The Department of Corrections fired Ouellet on suspicion that he had initiated the fight with the inmate. The claimant was subsequently successful in his battle for reinstatement.⁹¹

Ouellet claimed that the incident with the inmate, the verbal abuse, the firing, and the reinstatement process, caused him to suffer work-disabling injuries. The claimant's medical testimony demonstrated an authentic psychiatric disability, including anxiety and phobic reaction with accompanying regression and depression.⁹² In preparation for the hearing, the parties stipulated that the only issue was whether the claimant's psychiatric condition was a compensable personal injury under the Act.⁹³ In its "Findings of Fact and Order," which is devoid of citation to authority, the fact finders awarded compensation upon the finding that "[i]t is the opinion of [Dr.] William A. Woodruff . . . that the claimant is suffering from an authentic psychiatric disability which is work-related."⁹⁴ Since the decision held that claimant's psychiatric condition was indeed a "personal injury" within the Act's parameters, the *Ouellet* decision denotes the reception of mental injury within the "personal injury" clause of the Act. As such, it is a landmark case, albeit at the administrative level, in the Vermont workers' compensation scheme.

More recently, the Commissioner awarded continuing compensation to an injured employee in *Weaver v. Agway, Inc.*⁹⁵ The claimant suffered a personal injury by accident when an elevator, in which he was a passenger, fell one and a half stories. The employer and claimant entered into a private agreement for compensation. Almost two years later, the employer's insurance company discontinued compensation benefits upon the ground that the claimant's physical injuries had come to an end result. The claimant filed for a hearing before the Commissioner to determine whether he was still disabled and entitled to continuing compensation. The claimant argued that he was still disabled by psychologi-

91. *Id.*, Applicant's Hearing Brief, at 2.

92. *Id.*

93. *Id.*, Stipulation, at 4.

94. *Id.*, Findings of Fact and Order, at 1.

95. No. N 16453 (Hearing before the Comm'n of Labor & Industry, 1980) (Hearing Officer Fitzhugh presiding).

cal injuries.⁹⁶

The hearing officer found that the injury caused the claimant to suffer both physical and psychological injuries.⁹⁷ "From a psychological point of view, evidence presented by . . . psychiatrists, reveals that the trauma of the accident unleashed certain pre-accident personality weaknesses in the claimant, resulting in increased anxiety, irritability, disruption of personal relationships with others, insomnia and deterioration of his family life."⁹⁸ Furthermore, it was found that the accident was the "precipitating factor in the development of his neurosis."⁹⁹ The claimant was diagnosed, in accordance with the American Medical Association's "Guides to the Evaluation of Permanent Impairment," to be impaired by his neurosis at twenty percent of the whole man, and compensation was continued proportionate to this disability.¹⁰⁰

Neither *Ouellet* nor *Weaver* were appealed. The Vermont Supreme Court has thus never actually ratified the compensability of mental injury under Vermont's Workers' Compensation Act. Before endorsing the Commissioner's stance on the compensability of mental injury, the courts should consider the following issues: (1) the court's authority to construe liberally the "personal injury" clause to include mental injury; (2) the policy issue of who should bear the economic burden of mental injuries; and (3) the evidentiary problems associated with mental injury cases.

IV. POLICY & LEGAL ANALYSIS OF MENTAL INJURY COMPENSATION

A. *Legislative Duty To Amend Statute To Include Compensation For Mental Injury?*

Where Vermont courts have had to interpret ambiguous language in the Workers' Compensation Act, one approach has been to narrowly define the statute, thus deferring the decision to the legislature. For example, when compensation was denied in *Mas-*

96. See *id.*

97. *Id.*, Finding of Fact No. 3.

98. *Id.*, Finding of Fact No. 4; see also *id.*, Finding of Fact Nos. 14, 16.

99. *Id.*, Finding of Fact No. 5, see also *id.*, Finding of Fact No. 13.

100. To determine the percentage of the employee's permanent bodily disability, the Commissioner is guided by current professional guidelines on impairment, such as the "Guides To The Evaluation of Permanent Impairment" of the American Medical Ass'n See Rules Pertaining to Vermont's Workmen's Compensation and Occupational Disease Law, § 10(b) reprinted in VERMONT WORKMEN'S COMPENSATION LAW (1978) (adopted pursuant to Vt. STAT. ANN. tit. 21, §§ 602, 648 (1978)).

terson v. Rutland Hospital, Inc.,¹⁰¹ the court refused to define the "arising out of and in the course of employment" clause to include a disease contracted on the job over a period of time.¹⁰² The court noted that "[c]ases in which a causal connection is established between the disability and exposure to conditions of employment which result in illness exert a strong appeal for compensatory relief. But the corrective remedy lies with the legislature to change the coverage of the statute, rather than with the courts."¹⁰³ This interpretation leaves doubt as to whether the Vermont Supreme Court will allow mental injury to be compensable since it views its role as being a strict interpreter rather than an expansive reader of the Act.

The court, however, need not defer to the legislature the responsibility of expanding the Act to include mental injuries. As previously noted, Vermont's Act was modeled after the British Act.¹⁰⁴ In a workers' compensation case, the Vermont Supreme Court has noted that English decisions made before the Vermont enactment of the statute:

are strongly persuasive of the meaning intended by the Legislature. It is a settled doctrine of interpretation that, when a statute is adopted in this State from another state or country, if it has received a judicial interpretation there prior to its enactment here, it is to be taken that the language of our statute is used in the sense given to it by such prior adjudication, unless some other sense is indicated by attendant provisions of the statute.¹⁰⁵

Thus, the Vermont Supreme Court recognized the authority of English adjudications interpreting the Act. Case law exists in England awarding compensation for mental injuries. This case law predates Vermont's 1915 adoption of the British Act.

In *Eaves v. Blaenclwydach Colliery Co., Ltd.*,¹⁰⁶ a 1909 English case, the claimant was a collier employed by the defendant. The claimant had an accident arising out of and in the course of his

101. 129 Vt. 91, 271 A.2d 848 (1970).

102. *Id.* at 94, 271 A.2d at 850.

103. *Id.* at 94, 271 A.2d at 850 (citing *Madeo v. Dibner & Bros., Inc.*, 121 Conn. 664, 668, 186 A. 616, 618 (1936)).

104. See *supra* text accompanying note 15.

105. *Bosquet v. Howe Scale Co.*, 96 Vt. 364, 371, 120 A. 171, 173 (1923) (citing *Warner v. Warner's Estate*, 37 Vt. 356 (1864); *Adams v. Field*, 21 Vt. 256 (1849)).

106. [1909] 2 K.B. 73.

employment when a large rock fell on his foot. The defendant employer paid compensation in the amount of eighteen shillings per week for over three years, then filed to terminate compensation since the claimant was unable to utilize his leg which was "devoid of sensation."¹⁰⁷ The county court of Pontypridd found that although the injury had reached a physical end result, compensation should be reduced to a penny a week because the claimant could work despite persisting numbness in his leg. On appeal, the issue was "whether the nervous and mental condition of an injured workman ought to be taken into consideration in estimating the extent of his recovery and consequent earning capacity."¹⁰⁸ In holding that the claimant was entitled to further compensation, the Master of the Rolls, Cozens-Hardy stated:

The effects of an accident are at least two-fold: they may be merely muscular effects—they almost always must include muscular effects—and there may also be, and very frequently are, effects which you may call mental, or nervous, or hysterical, whichever is the proper word to use in respect of them. The effects of this second class, as a rule, arise directly from the accident from which the man suffered just as much as the muscular effects do, and it seems to me entirely a fallacy to say that a man's right to compensation ceases when the muscular mischief is ended, though the nervous or hysterical effects still remain.¹⁰⁹

The *Eaves* case thus evidences the English acceptance of the compensability of mental injury when a physical trauma caused physical and mental injury. If the *Eaves* decision stood alone, it would remain unclear whether mental injury, by itself, was compensable under the Act. However, the *Eaves* case is complemented by the 1910 decision of *Yates v. South Kirkby & Co. Collieries, Ltd.*¹¹⁰

In *Yates*, the claimant was a collier in the respondent employer's coal mine. While working in the mine, Yates responded to a fellow collier's cry for help. The claimant found the distressed

107. *Id.* at 74.

108. *Id.* at 73.

109. *Id.* at 75. Law Judge Fletcher Moulton agreed: "In my opinion, so long as these serious consequences remain, the man is entitled to compensation just as much as if his muscular power had not come back." *Id.* at 76. Law Judge Farwell also agreed: "The man is suffering from traumatic neurasthenia and he has not recovered from it. Therefore he has not recovered his earning capacity and is still entitled to compensation." *Id.* at 76-77.

110. [1910] 2 K.B. 538.

co-worker injured from a cave-in; the co-worker was bleeding profusely. Yates carried him out of the cave, but the co-worker died within fifteen minutes. The claimant Yates sustained a nervous shock in response to the incident. From that time forward, he was unable to work in the coal mine even though he was consulting a doctor.¹¹¹ Law Judge Kennedy, one of three presiding judges, classified the claimant's injury as a "genuine condition of neurasthenia."¹¹²

The question raised in the case was whether the nervous shock suffered as a result of the incident was compensable under the British Workmen's Compensation Act.¹¹³ The court held the injury compensable, and an examination of the opinions of two of the judges sheds light on their collective reasoning. Master of the Rolls Cozens-Hardy noted that the traumatic accident "created such a shock that it produced a physiological effect, although there was no abrasion, or cut, or wound visible to the eye."¹¹⁴ Citing the *Eaves* decision, Cozens-Hardy recognized that the court decisions "shew that when a man in the course of his employment sustains a nervous shock producing physiological injury, not a mere emotional impulse, he meets with an accident arising out of and in the course of his employment."¹¹⁵ Similarly, Law Judge Farwell opined that "nervous shock due to accident which causes personal incapacity to work is as much 'personal injury by accident' as a broken leg."¹¹⁶ Farwell felt no distinction needed to be drawn between physical and mental injuries.¹¹⁷

Therefore, given the rule that when a statute is adopted from another country, the case law of that country interpreting the statute before its adoption in Vermont "is to be taken . . . in the sense given to it by such prior adjudication . . .,"¹¹⁸ the supreme court need not fall back from this problem by deferring to the legislature. The *Eaves* and *Yates* cases provide an avenue by which the Vermont courts can compensate claimants for work-related mental injuries.

111. *Id.* at 538-39.

112. *Id.* at 542.

113. *Id.* at 538.

114. *Id.* at 540.

115. *Id.* at 541.

116. *Id.* at 542.

117. *Id.*

118. *Giguere v. Whiting Co.*, 107 Vt. 151, 157, 177 A. 313, 316 (1935).

B. *Employer Or Employee: Who Should Bear The Burden Of Mental Injuries?*

Any determination of who should bear the costs of mental injuries involves political considerations. The courts will have to adopt either a variation of the thin skull rule,¹¹⁹ requiring business to absorb the expenses of compensation as a cost of doing business, or the doctrine *lex non favet delicatorem votis*,¹²⁰ requiring the individual employee to bear the costs.

There have been several reasons propounded for following the *non favet* approach. First, the volume of claims already being compensated has posed a threat to the compensation system.¹²¹ The rationale behind this theory is that the number of claims settled in favor of the employee has caused the insurance costs of the employers to skyrocket. As true as this may be, the employer does not pay for the compensation insurance out of his profits; the costs of this burden are passed on to the consumer. The resolution of the problem of whether the injured employee or the consumer should thus bear the burden is best left to the political arena.

Second, it is argued that the employer should not bear the costs of workers' compensation for mental injuries since "the relationship between the workplace and stress is difficult to establish because of the degree to which the impact of stress depends upon the particular personality involved."¹²² Since this causal link is so difficult to establish, the argument proceeds that the employer should be relieved of liability. Medical authorities agree that the causal link is problematic:

While it is true that the impressions of the environment on an individual are built into his personality structure with varying degrees of adequacy, it is also true that, at any time in the life span, the surroundings of the individual may constitute a stress that will contribute to the appearance of mental illness. The interplay of predisposition and stress is

119. See Seavy, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 32-33 (1939); 52 HARV. L. REV. 372, 384-85 (1939); 48 YALE L.J. 390, 402-03 (1939). By analogy, the thin skull rule applied to employment law would require the employer to take the employee "as he comes."

120. "The law favors not the wishes of the dainty." BLACK'S LAW DICTIONARY 821 (Rev. 5th ed. 1979).

121. LaDou, Mulryan & McCarthy, *Cumulative Injury or Disease Claims: An Attempt to Define Employers' Liability for Workers' Compensation*, 6 AM. J. OF L. & MED. 1, 2 (1980).

122. *Id.* at 14.

complex and is difficult to define in terms of causation.¹²³

The causal link problem is not the sole reason put forth for relieving the employer of the burden of compensating mental injuries. The employer's position states that to place this economic burden on the employer now would upset the balance in the trade-off of rights and duties between employer and employee that is at the core of the workers' compensation system.¹²⁴

The Vermont Supreme Court has noted that if the employee fails to meet his burden of proving causation, he is not entitled to compensation under the Act.¹²⁵ It follows that medical testimony should be produced to prove the causal link between the workplace and the mental injury. The court apparently has been lax in requiring even this modicum, for it has stated that "testimony of the injured party may outweigh that of medical witnesses."¹²⁶ Such a standpoint does not provide much protection to the employer: it should be modified to the extent that testimony of the injured party may be some evidence of a disabling mental injury, but should not, by itself, be the grounds for a compensating judgment. If medical testimony has been presented by the employer stating no causal link between the work environment and the mental disability, the employee should be required to affirmatively counter the argument with contrary medical testimony establishing the causal link. As deep as the employer's insurer's pocket may be, protection of this nature should be provided to prevent fraud.

Although the causal link may be difficult to prove, the claimant's burden is not insurmountable. The claimant's argument should be framed by the premise that people's individual personality capacities tolerate accidents differently: "People vary greatly in their personality strengths and weaknesses, and the capacity for flexible tolerance which the victim brings with him to the accident must be duly considered as one determinant of his post-accident recovery from its psychological impact."¹²⁷ In support of claimant's

123. AMERICAN MEDICAL ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 149 (1971).

124. See *supra* note 12 and accompanying text.

125. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395, 406 A.2d 390, 391 (1979).

126. *Merrill v. University of Vermont*, 133 Vt. 101, 105, 329 A.2d 635, 638 (1974) (quoting *American Gen. Ins. Co. v. Florez*, 327 S.W.2d 643, 648 (Tex. Civ. App. 1959)).

127. Modlin, M.D., "Accidents" and *Traumatic Neurosis*, in 3 *LAWYER'S MEDICAL CYCLOPEDIA*, § 20.71, 79, 84 (1980 Supp.). Although mental injuries are sometimes viewed as fanciful, "the disturbance which the individual experiences is not imaginary to him. The subsequent incapacity is as real to the claimant as that resulting from a clearly discernible

right to recover, Professor Larson has pointed out that no valid distinction should be drawn between physical and mental injuries:

Certainly modern medical opinion would support this view and insist that it is no longer realistic to draw a line between what is 'nervous' and what is 'physical.' It is an old story in the history of law to observe legal theory constantly adapting itself to accommodate new advances and knowledge in medical theory. Perhaps in earlier years, when much less was known about mental and nervous injuries and their relation to 'physical' symptoms and behavior, there was an excuse, on the grounds of evidentiary difficulties, for ruling out recoveries based on such injuries, both in tort and in workmen's compensation. But the excuse no longer exists.¹²⁸

If the employer takes his employees as they come through the gates of employment,¹²⁹ he becomes responsible for the injuries sustained by his employees during the course of their employment. This is true even where the accident merely aggravates a pre-existing latent characteristic which causes disablement.¹³⁰ As a matter of public policy, the economic burden of mental injuries may fall more justly on the employer. Both the high level of hospital admissions for mental or emotional problems¹³¹ and the recent governmental policies of reducing government subsidies to health facilities often combine to work an economic hardship on the injured person. These factors should be considered in determining whether the employer should be required to share the societal burden of caring for the mentally injured.

The main rationale for following the thin skull approach of placing the burden of compensating mental injuries on the employer, finds its foundations in the general principles underlying the Act. The courts have recognized that the Act was designed to treat work-related injury compensation as part of the cost of doing

'physical' disability." *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 29, 268 N.W.2d 1, 12 (1978). The "equation of 'mental' with 'unreal,' or imaginary, or phoney, is so ingrained that it has achieved a firm place in our idiomatic language." Larson, *supra* note 54, at 1243.

128. Larson, *supra* note 54, at 1253.

129. See *supra* note 119.

130. See *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 35-36, 421 A.2d 1291, 1294 (1980) (citing *Marsigli Estate v. Granite City Auto Sales*, 124 Vt. 95, 103, 197 A.2d 799, 805 (1964)); *Laird v. State Highway Dep't*, 112 Vt. 67, 86, 20 A.2d 555, 565 (1941); *Morrill v. Charles Bianchi & Sons*, 107 Vt. 80, 87-88, 176 A. 416, 419-20 (1935)).

131. Note, *When Stress Becomes Distress: Mental Disabilities Under Workers' Compensation in Massachusetts*, 15 NEW ENG. L. REV. 287, 287 (1979-80).

business.¹³² As such, the burden of compensating mental injuries falls upon the employer. As pointed out earlier, the Act was intended to be a trade-off whereby the employee waived his rights to large damage awards in tort actions in consideration for the employer's release of common law defenses to the employee's claim.¹³³ This historical basis of the Act¹³⁴ clearly indicates that the drafters of the Act intended for the "personal injuries" clause to be interpreted liberally in order to effectuate the Act's underlying policies.

C. *Evidentiary Problems Within Mental Injury Litigation*

Because individuals respond differently to similar trauma,¹³⁵ any rigid *objective* evidentiary standard would not be appropriate for determining the compensability of mental injury cases.¹³⁶ There is often a lack of visible physiological effects—no broken bones, scarred tissue, or similar physical indications. "[T]he study of psychological hazards in the work environment, i.e., work 'stress', has tended to produce only fragmentary evidence, which has been difficult to replicate and is subject to multiple etiological interpretations."¹³⁷ The causal link between the work environment's stress factors and the subjective perceptions of individual employees is very tenuous.¹³⁸ Given the subjective nature of the mental injury, the fact finder must determine whether the claimant's own perceptions of the work environment keep him from returning to work.¹³⁹ A subjective standard must be utilized to determine if the claimant truly suffers from a work-related mental disability.

Stare decisis implicitly requires a subjective standard be applied in determining the compensability of mental injury. Where the medical cause of the injury is beyond the ken of a layman, expert testimony must be presented to establish the possibility of such an injury within the mind of the claimant.¹⁴⁰ Once this subjective nature of the injury has been established, the court has allowed the claimant's own testimony to be the basis upon which

132. *Bundy v. State Highway Dep't*, 102 Vt. 84, 87, 146 A. 68, 69 (1929).

133. See *supra* text accompanying note 12.

134. See *supra* text accompanying notes 6-18.

135. Kasl, *supra* note 58, at 682-83.

136. *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 27, 268 N.W.2d 1, 11 (1978).

137. Kasl, *supra* note 58, at 682.

138. *Id.* at 683.

139. *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 30-31, 268 N.W.2d 1, 13 (1978).

140. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 19, 20 A.2d 99, 100 (1941).

compensation may be awarded.¹⁴¹ It is then left to the scrutiny of the trier of fact to determine from the competency and "honest perception" of the claimant's testimony whether he is suffering from neurosis or other mental injury.¹⁴²

Complicating the evidentiary problems found in mental injury compensation cases is the fear of "malingerers." A malingerer is one who feigns an injury both to avoid the performance of work and to gain compensation.¹⁴³ Malingerers are easier to detect where a physical injury is involved, such as a back injury, than where a mental injury is at issue. The detection of malingerers has been a concern of both English and American courts.¹⁴⁴ The problems of detecting malingerers in mental injury cases, however, may not be as difficult to handle as first perceived. A list of twelve questions has been drafted to determine if a claimant of mental injuries is, in fact, a malingerer:

1. Was the reputation of the patient prior to the accident one of honesty and integrity? Was he considered a good citizen?
2. Was the patient prior to the accident a steady worker? Was he on time? Did he do a good job? Was his accident rate average or lower than average? Was his absentee rate average or lower than average?
3. Was the accident a sudden, unexpected one?
4. Following the accident, was the patient co-operative in following the physician's orders? Did he take his medicine as prescribed? If asked to see another physician in consultation, did he willingly do so? If surgery was advised, did he agree to have the surgery?
5. If advised to see a psychiatrist, did he co-operate? Did he keep all appointments with the psychiatrist? If the psychiatrist advised hospitalization in a mental hospital, did the patient go to the mental hospital?
6. If the patient was hospitalized for any reason in connection with the accident, did he get worse or fail to improve?
7. Did the patient, on his own, seek out other physicians to

141. *Merrill v. University of Vt.*, 133 Vt. 101, 105-06, 329 A.2d 635, 638 (1974).

142. *See id.* at 105, 329 A.2d at 638. Continuance of compensation for mental injury may be based upon claimant's own testimony "which has probative value and is sufficient to support a finding." *Id.*

143. *See* BLACK'S LAW DICTIONARY 1111 (Rev. 4th ed. 1968) (defines "malinger").

144. *Weaver v. Agway Inc.*, No. N 16453 (Hearing Before the Comm'n of Labor & Industry, 1980); *Yates v. South Kirkby & Co. Collieries, Ltd.*, [1910] 2 K.B. 538, 540-41; *Eaves v. Blaenclwydach Colliery Co., Ltd.*, [1909] 2 K.B. 73, 75.

examine him?

8. If advised to take psychological tests, did the patient cooperate? Did psychological testing indicate a neurotic or psychotic personality?

9. Was there evidence to show that the patient exhibited the same symptomatology when he knew he was not being observed as when he was observed? (Such as reports from associates, motion pictures, etc.)

10. Did the patient complain about being unable to play and enjoy his usual pleasures as well as complain about being unable to work? Did he actually quit playing just as he quit work?

11. Would the patient or did the patient return to some type of work if advised that this would be the only way he could recover from his illness?

12. Did the patient seemingly enjoy seeing numerous doctors?¹⁴⁵

This list serves as an objective guidepost to the malingerer issue and provides needed assistance to fact finders faced with mental injury cases.

Another evidentiary problem in mental injury cases arises when the fact finder must trace the mental injury to the work environment. As discussed earlier, *Campbell v. Heinrich Savelberg, Inc.*¹⁴⁶ modified *Masterson v. Rutland Hospital, Inc.*¹⁴⁷ such that a claimant is no longer required to trace the injury to one specific fortuitous work-related accident.¹⁴⁸ However, the claimant still must be able to trace the resultant injury to "a proximate cause set in motion by the employment, and not by any other agency, or there can be no recovery."¹⁴⁹ It may prove extremely difficult for the employee to trace the causal link, especially where the employer produces evidence that the employee was subject to stressful situations occurring outside of his employment.

The Vermont Supreme Court has stated that there "must be created in the mind of the trier something more than a possibility, suspicion or surmise that the work-related injury was the cause, and the inference from the facts proved must be at least the *more*

145. Dearman, M.D., *Neurosis as the Result of Trauma*, in 3 *LAWYER'S MEDICAL CYCLOPEDIA* § 20.10, at 206 (1970).

146. 139 Vt. 31, 36, 421 A.2d 1291, 1294 (1980).

147. 29 Vt. 91, 271 A.2d 848 (1970).

148. See *supra* text accompanying notes 62-73.

149. *Bundy v. State Highway Dep't*, 102 Vt. 84, 87, 146 A. 68, 69 (1929).

probable hypothesis, with reference to the possibility of the other hypotheses."¹⁵⁰ Applying this test to mental injury cases is troublesome because it is a very difficult task for the fact finder to separate work-related from nonwork-related stress factors where "a constellation of psychodynamic factors"¹⁵¹ is involved. The inability to completely separate work-related, from nonwork-related, factors should not in itself be the basis for denying compensation. Analogous support for the proposition that these tracing problems should not bar recovery can be found in the field of tort law.

In *Sheltra v. Smith*¹⁵² the tort of intentional infliction of mental distress was claimed. Various reasons why this tort should not be recognized, including evidentiary problems and speculative damage measurements, were rejected by the court, which did not believe it would be any more difficult to measure mental distress than it would be to measure the widely accepted pain and suffering claim.¹⁵³ No clear standard can be set by which to measure whether or not a claimant has successfully traced his injury to a work-related stressful trauma. The *Burton* court's "more probable hypothesis" test, however, seems a satisfactory approach to the issue of deciding whether the mental injury is traceable to the work environment.

CONCLUSION

The compensability of mental injuries under Vermont's Workers' Compensation Act is a recent phenomena. The Department of Labor and Industry's awards of compensation for such injuries have yet to be ratified by the Vermont Supreme Court. Such mental injury awards may be affirmed for a number of reasons.

First, the historical and political background indicates that the remedial purpose of the statute is to compensate employees for work-related injuries. The traditional workers' compensation claim was for physical injuries only, but the current trend "suggests that the time is perhaps not too far off when compensation law gener-

150. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20, 20 A.2d 99, 100 (1941) (emphasis added).

151. *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 28-29, 268 N.W.2d 1, 12 (1978).

152. 136 Vt. 472, 392 A.2d 431 (1978).

153. *Id.* at 475, 392 A.2d at 432-33. *Accord* *Simon v. R.H.H. Steel Laundry, Inc.*, 25 N.J. Super. 50, 54-56, 95 A.2d 446, 447-48 (1953). *But cf.* *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 513-14, 369 N.Y.S.2d 637, 644, 330 N.E.2d 603, 608 (1975) (dissenting opinion by Breitel, C.J.).

ally will cease to set an artificial and medically unjustifiable gulf between the 'physical' and the 'nervous.'¹⁵⁴

Second, the legislature has left to the courts the responsibility of setting the parameters for the "personal injury" clause.¹⁵⁵ Although the courts could avoid the inclusion of mental injuries within this clause on the ground that such was not the legislature's intent, an alternative avenue is available that would allow mental injuries to fall within the scope of the "personal injury" clause. The courts have repeatedly accepted as persuasive authority foreign case law interpreting foreign statutes that have been adopted by Vermont. Thus, the courts could look at the English decisions pre-dating Vermont's adoption of the British Workmen's Compensation Act. Those decisions clearly support the compensability of mental injury.¹⁵⁶

Third, the Vermont Supreme Court has established a test for determining the compensability of *physical* injuries which could also be applied to *mental* injury cases without the need for interpretative manipulation. This test requires the claimant to prove the causal connection between the working environment and the claimed injury such that the fact finder can determine that the plaintiff's causal theory is the more probable hypothesis.¹⁵⁷ This test is tempered by the recognition that nonphysical injury is subjective in nature, requiring flexibility in evidentiary finding. This qualification proves equitable both for the employer and the employee. The test further recognizes the medical developments which have helped to establish the causal link between the injury and the working environment.

Finally, as a policy matter, the economic state of modern society favors placing the economic burden upon the employer to compensate employees for work-related mental injuries.¹⁵⁸ The decrease in public welfare and government subsidies to health facilities evidences a need to place the burden of compensation upon one of the two participants in the working place—the employer or the employee. The employer accepts the employee, with

154. Larson, *supra* note 54, at 1260. See also Modlin, M.D., *Psychiatric Reaction to Accidents*, 6 WASHBURN L.J. 317 (1967) (presented at Medico-Legal Symposium, sponsored by the American Bar Ass'n, Miami Beach, Fla., March 10, 1967).

155. See *supra* text accompanying notes 32-36.

156. See *supra* text accompanying notes 106-18.

157. See *supra* text accompanying notes 76-77.

158. See *supra* text accompanying note 126.

all his pre-existing personality traits, including tolerance levels to work environment stress, as the employee comes through the gates of employment. Where the employee is unable to tolerate workplace stress factors, the trend has been to require the employer to bear the expense of mental injuries as a cost of doing business. The Workers' Compensation Act was clearly enacted as a remedial statute aimed at compensating an employee for disabling injuries. There is no reason why a distinction should be drawn between physical and mental injuries when the resultant disability causes virtually the same predicament.

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