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The Causation Issue in Workers'Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective

Lawrence Joseph

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The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective

*Lawrence Joseph**

Cases under workers' compensation systems that concern mental disabilities present special problems in the determination of causation. In this Article Mr. Joseph argues that the complexities inherent in a decision whether a mental disability has arisen out of employment force administrative agencies and courts in these cases to engage in normative evaluative inquiries. These inquiries, according to Mr. Joseph, result in findings that potentially frustrate the underlying compromise policy of workers' compensation systems; these evaluative decisions create classes of claimants that may be under or overinclusive. Mr. Joseph describes several possible solutions to this problem and concludes by reviewing Professor Burton's proposal of a "Worker's Disease Protection Act." This Act would allow recovery for disabilities of unknown etiology regardless of causation and, Mr. Joseph argues, is a systemic solution that deserves serious consideration.

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* Associate, Shearman & Sterling, New York, N.Y. B.A., 1970, University of Michigan; B.A., 1972, Cambridge University; J.D., 1975, University of Michigan; M.A., 1976, Cambridge University. The author wishes to thank the Employment Standards Administration of the United States Department of Labor for financial assistance that greatly facilitated the writing of this Article, and former colleagues at the University of Detroit School of Law, Professors Robert Brown, Peter Linzer, Peter Schanck, and James O'Fallon.

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I. INTRODUCTION

The causal relation between employment and a disabling mental or emotional injury[1] presents one of the most complex issues in accidental injury and workers' compensation law.[2] Resolution of the issue

1. This Article contains several interchangeable terms—"psychological," "emotional," "nervous," and "mental"—that describe the kind of injuries which the Article addresses. Although a mental injury—as opposed to a physical injury—is extremely difficult to define for medical or legal purposes, this Article utilizes the distinction between mental and physical injuries for two reasons. First, the distinction is analytically convenient. Second, in workers' compensation cases jurisdictional concerns require the distinction. For a discussion of the relevance of tbe distinction between a physical and mental injury to the issue of causation in workers' injury cases, see *infra* notes 102, 233-34, & 246 and accompanying text.

2. Legal literature largely has ignored the difficult technical and policy problems inherent in the determination of causation in mental injury cases. A 1961 law review comment on work related mental disorders, however, contains a superb analysis of the causation issue. Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions,* 70 YALE L.J. 1129, 1138-45 (1961) [hereinafter cited as Comment, *Workmen's Compensation Awards*]. Although this Comment preceded the important state supreme court mental disability opinions of the 1960's and 1970's, *see infra* notes 113-88 and accompanying text, it still retains enormous analytical value. Professor Larson briefly discusses the causation issue in his treatise. *See* 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23 (1982). Professors Malone and Small also have alluded implicitly to the issue in articles on factual causation. Malone, *Ruminations on Cause-in-Fact,* 9 STAN. L. REV. 60 (1956); Small, *Gaffing At a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEX. L. REV. 630 (1953). The author has analyzed the causation issue in relation to Michigan's unique judicial and legislative experience with workers' compensation. Joseph, *Causation in Workers' Compensation Mental Disability Cases: The Michigan Experience,* 27 WAYNE L. REV. 1079 (1981). For a discussion of the leading cases in Michigan, see *infra* notes 171-88 and accompanying text.

Professor Larson has written the generally acknowledged leading article on mental disabilities. Larson, *Mental and Nervous Injury in Workmen's Compensation,* 23 VAND. L. REV. 1243 (1970) [hereinafter cited as *Mental and Nervous Injury*]; *see* 1B A. LARSON, *supra,* §§ 42.20-24. Professor Larson's article, however, does not address directly the causation issue. Rather, the article examines whether mental injuries satisfy tbe "personal injury" requirement of compen-

requires at least an elementary appreciation of psychiatric principles and an understanding of the causes of mental disorders; consequently the issue has an interdisciplinary dimension. In addition, the issue is technically complex. A workers' compensation system is the accidental injury law system that deals with injuries which relate to employment. A legislatively defined "coverage formula"—the "personal injury by accident arising out of and in the course of employment" requirement[3]—and the legislative objectives that underlie the

sation statutes. For a discussion of the personal injury requirement and its technical relation to mental disabilities, see *infra* notes 101-02 and accompanying text.

The topic of work related mental disorders has attracted extensive commentary. *See* P. BARTH, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES 80-83 (1980); 13 W. MALONE & H. JOHNSON, LOUISIANA CIVIL LAW TREATISE, WORKERS' COMPENSATION LAW AND PRACTICE § 235 (2d ed. 1980); W. MALONE, M. PLANT, & J. LITTLE, CASES AND MATERIALS ON WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS 260-67 (2d ed. 1980); NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 199-200 (1973) [hereinafter cited as COMPENDIUM]; M. SHAPO, CASES AND MATERIALS ON TORTS AND COMPENSATION LAW 14-40 (1976); Brill, *Compensation for Psychiatric Disorders,* in COMPENSATION IN PSYCHIATRIC DISABILITY AND REHABILITATION 300 (J. Leedy ed. 1971) [hereinafter cited as Brill]; Brill & Glass, *Workmen's Compensation for Psychiatric Disorders,* 193 J. A.M.A. 345 (1965); Fleming, *Industry Looks at the Emotionally Troubled Employee,* in THE EMOTIONALLY TROUBLED EMPLOYEE: A CHALLENGE TO INDUSTRY 57 (1976) [hereinafter cited as Fleming]; Lesser & Kiev, *Psychiatric Disability and Workmen's Compensation,* in MENTAL HEALTH AND WORK ORGANIZATION 237 (1970) [hereinafter cited as Lesser & Kiev]; Levine, *Legal Questions Regarding the Causation of Occupational Disease,* 26 LAB. L.J. 88, 104-06 (1975); Loria, *The Mind is the Matter,* 53 J. URB. L. 895 (1976); Manson, *Workmen's Compensation and Disabling Neurosis,* 11 BUFFALO L. REV. 376 (1962); McLean, *The Psychiatrist Looks At the Emotionally Troubled Employee,* in THE EMOTIONALLY TROUBLED EMPLOYEE: A CHALLENGE TO INDUSTRY 3 (1976) [hereinafter cited as McLean]; Render, *Mental Illness as an Industrial Accident,* 31 TENN. L. REV. 288 (1964); Robitscher, *Mental Suffering and Traumatic Neurosis,* in COMPENSATION IN PSYCHIATRIC DISABILITY AND REHABILITATION 218 (J. Leedy ed. 1971) [hereinafter cited as Robitscher]; Selzer, *Psychological Stress and Legal Concepts of Disease Causation,* 56 CORNELL L. REV. 951, 954-56, 961 (1971); Smith & Solomon, *Traumatic Neurosis in Court,* 30 VA. L. REV. 87, 138-49 (1943); Spenser, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination Under Federal and State Employment Statutes and Arbitration Decisions,* 53 ST. JOHN'S L. REV. 659, 711-18 (1979); Trice & Roman, *Occupational Risk Factors in Mental Health and the Impact Role Change Experience,* in COMPENSATION IN PSYCHIATRIC DISABILITY AND REHABILITATION 145 (J. Leedy ed. 1971) [hereinafter cited as Trice & Roman]; Note, *When Stress Becomes Distress: Mental Disabilities Under Workers' Compensation In Massachusetts,* 15 NEW ENG. L. REV. 287 (1980); Note, *Nervous Disabilities Induced by Repetitious Mental Trauma Held Noncompensable:* Transportation Insurance Co. v. Maksyn, 33 SW. L.J. 905 (1979); Comment, *Recovery for Nervous Injury Resulting from Mental Stimulus Under Workmen's Compensation Laws,* 53 CHI.-KENT L. REV. 731 (1977) [hereinafter cited as Comment, *Recovery for Nervous Injury*]; Comment, *Workmen's Compensation—Compensability of Mental Injury*—In re Wolfe v. Sibley, Lindsay, & Curr Co., 21 N.Y.L.F. 465 (1976); Comment, *The Compensability of Mentally Induced Occupational Diseases Under Texas Workers' Compensation Laws,* 10 ST. MARY'S L.J. 148 [hereinafter cited as Comment, *Texas Workers' Compensation Law*]; Rice, Can Companies Kill?, PSYCHOLOGY TODAY, June 1981, at 78; Lubin, *On-the-Job Stress Leads Many Workers to File—and Win—Compensation Awards,* Wall St. J., Sept. 17, 1980, at 33, col. 4.

3. This statement of the coverage formula incorporates the language of the majority of

formula restrict judicial interpretations in causation inquiries.[4] Furthermore, in most workers' compensation systems, administrative, not judicial bodies, make initial legal and factual determinations. This structure creates technical problems.[5] Because one cannot objectively prove the cause of mental disorders,[6] administrative triers must make evaluative decisions that potentially conflict with the policy directives of the workers' compensation system. Appellate courts, then, must make evaluative decisions about causation, which judges frame as questions concerning sufficiency of the evidence.[7]

The adjudicative process for mental injuries in workers' compensation cases differs radically from the determination whether to impose liability for emotional injury under the common-law tort system.[8] In tort actions concerning mental injury, courts have addressed

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state statutes. 4 A. LARSON, *supra* note 2, app. A, table 1 (1980). The source of tbis and similar language is the British Compensation Act. 1 A. LARSON, *supra* note 2, § 6.10. A minority of states have enacted substantive variations of the formula. 4 A. LARSON, *supra* note 2, app. A, table 1. These statutory variations, however, have not substantively affected the compensability of mental injuries. 1B A. LARSON, *supra* note 2, § 37.10.

4. *See infra* notes 58-63 and accompanying text.

5. *See infra* notes 65-69 & 96-100 and accompanying text.

6. *See infra* notes 45, 51, & 57 and accompanying text.

7. *See infra* notes 202-05 and accompanying text.

8. *See infra* notes 39-57 and accompanying text. The literature exploring the problems of allocating loss for mental injury under the tort system is extensive and impressive. The earliest articles on the subject have become classics. *See* Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Green, *"Fright" Cases*, 27 ILL. L. REV. 761 (1933); Harper & McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) [hereinafter cited as Magruder]. Two articles in the 1940's still remain vital sources of analysis. *See* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944) [hereinafter cited as *Relation of Emotions to Injury and Disease*]; Smith & Solomon, *supra* note 2. The treatise writers also have addressed the subject comprehensively. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 9.1-.3 (1956 & Supp. 1968); 2 F. HARPER & F. JAMES, *supra*, § 18.4; W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 12, 54 (4th ed. 1971).

For analyses of the causation issues that arise in mental injury tort actions, see Selzer, *supra* note 2; Smith, *Problems of Proof in Psychic Injury Cases*, 14 SYRACUSE L. REV. 586 (1963) [hereinafter cited as *Problems of Proof*]; Note, *Causation in Disease: Quantum of Proof Required to Reach the Jury*, 53 NW. U.L. REV. 793 (1959).

For analyses of the broad spectrum of legal and medical problems that occur in mental injury actions, see F. BOHLEN, STUDIES IN THE LAW OF TORTS 252 (1956); RESTATEMENT (SECOND) OF TORTS, §§ 46, 48, 312, 313, 436, 436a (1965); Averbach, *Causation: A Medico-Legal Battlefield*, 6 CLEV.-MAR. L. REV. 209 (1957); Bohlen & Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbances*, 32 COLUM. L. REV. 409 (1932); Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232 (1962); Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEV.-MAR. L. REV. 428 (1957); Goodhart, *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14 (1953); Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355, 1386-95 (1974); Rendall, *Nervous Shock and Tortious Liability*, 2 OSGOODE HALL L.J. 291 (1961); Com-

their inability to prove objectively mental disorders by adopting judicial standards that are applicable within the respective policy domains of the judge and the jury.[9] The cause-in-fact inquiry in mental injury tort actions, which is an evaluative decision because of the absence of objective proof, also occurs within the judge-jury decisionmaking process.[10] This process, which is the same as other common-law policy based decisions, creates no policy conflict.[11] The different decisionmaking processes that exist within the workers' compensation system and the tort system, therefore, raise difficult jurisprudential questions: whether workers' compensation systems or the tort system should administer economic allocations for injuries such as mental disorders that cannot be linked objectively to an employee's work; and whether the judiciary or the legislature should choose the appropriate system.[12]

Another source of the complexity in workers' compensation mental disability cases lies in the potentially far-reaching social and economic consequences of any resolution of the causation issue. Commentators estimate that between fifteen and thirty percent of the general population suffers impaired efficiency because of mental problems.[13] Furthermore, no one disputes that an employee's work environment significantly affects his psychological well-being.[14] A resolution of the causation issue thus raises important and difficult distributive considerations.[15]

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ment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort,* 59 GEO. L.J. 1237 (1971) [hereinafter cited as Comment, *Negligently Inflicted Mental Distress*]; Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases,* 35 U. CHI. L. REV. 512 (1968).

9. *See infra* notes 45, 47, 51, & 57 and accompanying text.

10. *See infra* notes 46-57 and accompanying text.

11. *See infra* notes 53-54 and accompanying text.

12. Professor Keeton has analyzed comprehensively the intricate processes of reform of accidental injury loss-shifting policies. *See* R. KEETON, VENTURING TO DO JUSTICE REFORMING PRIVATE LAW (1969). In addition, Professor O'Connell and Dean Henderson have raised important and probing questions about the systemic nature of these reforms. *See* J. O'CONNELL & R. HENDERSON, TORT LAW: NO-FAULT AND BEYOND 581-808 (1975). Professors Barth and Burton, and Dean Henderson have made three of the few attempts to confront directly the question of compensation for alleged work related injuries with unknown etiologies. BARTH, *supra* note 2, at 278-79; Henderson, *Should Workmen's Compensation Be Extended to Non-occupational Injuries?*, 48 TEX. L. REV. 117 (1969); Burton, The Challenge of Diseases for Workers' Compensation (October 7, 1981) (unpublished manuscript) (copy on file at offices of *Vanderbilt Law Review*). *See infra* notes 247-55 and accompanying text.

13. *See, e.g.,* Fleming, *supra* note 2, at 57.

14. *See* McLean, *supra* note 2, at 3.

15. The "distributive considerations" that this Article refers to are the interrelated policy bases—whether moral, economic, or social—that the legislature or a court considers when deciding on the allocation of the costs of work related mental injuries through the adoption of a

The first purpose of this Article is to explore comprehensively the technical and policy dimensions of the causation issue in workers' compensation mental disability cases.[16] To achieve this purpose, part II of the Article analyzes the nature of mental disorders. Part III discusses the substantive approaches to mental disorders under tort law. Part IV examines in detail the structure and purpose of workers' compensation systems and explores the systems' technical and policy dimensions. This part then discusses the approaches that courts have taken when confronted with the causation issue in mental disability cases. Part V of the Article criticizes the judicial approaches and their underlying policy bases.

The second purpose of this Article is to clarify the distributive and jurisprudential considerations that courts and legislatures inevitably confront in their attempts to resolve the mental disability issue. Consequently, part VI of the Article presents judicial and legislative solutions to this problem. This part then classifies and discusses the distributive and jurisprudential ramifications of each of these solutions.

A third, more general purpose of the Article is to provide a method of technical and policy analysis that applies not only to mental disabilities, but also to other disabling diseases of unknown etiology, including cardiovascular and back related disabilities. These disabling diseases contain essentially the same kind of technical, pol-

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particular causation formula. For an analysis of the policy bases of causation inquiries in work related mental injury actions, see *infra* notes 189-214 and accompanying text. For a discussion of the distributive ramifications of various proposed solutions to the mental disahility causation issue, see *infra* notes 231-32 & 236 and accompanying text.

An impressive body of literature has addressed the difficult distributive questions that arise in allocating the costs of personal injuries—including but not limited to emotional injuries. *See* G. CALEBRESI, THE COSTS OF ACCIDENTS (1970); Calebresi, *Optimal Deterrence and Accidents,* 84 YALE L.J. 656 (1975); Calebresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499 (1961) [hereinafter cited as Calebresi, *Risk Distribution*]; Calebresi & Hirschoff, *Toward a Test for Strict Liability in Tort,* 81 YALE L.J. 1055 (1972); Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960); Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory,* 85 HARV. L. REV. 537 (1972); James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L.J. 549 (1948); Posner, *Strict Liability: A Comment,* 2 J. LEGAL STUD. 205 (1973).

16. For purposes of analysis, this Article assumes that claimants alleging employment related mental disorders have been disabled. The Article does not discuss the technical issues that surround the determination whether a mental injury has disabled a claimant. For a general discussion of the disability concept under workers' compensation acts, see *infra* note 64 and accompanying text. For an analysis of the problems relating to the disability issue and mental injuries, see Lerner, *Evaluation of Disability Resulting From Psychiatric Conditions,* in COMPENSATION IN PSYCHIATRIC DISABILITY AND REHABILITATION 47 (J. Leedy ed. 1971); Lesser & Kiev, *supra* note 2, at 242-45; Comment, *Workmen's Compensation Awards, supra* note 2, at 1131-35.

icy, administrative, and medical causation issues as do mental disabilities. Accordingly, the same technical, distributive, and jurisprudential methods of analyses that the Article applies to mental disabilities are applicable, by analogy, to these other diseases.

The broad based methodology of this Article provides a foundation for the final perspective. The Article concludes that a legislatively created compensation system designed and structured to deal specifically with most of the technical and policy considerations in mental disability cases and cases that concern disabling diseases of unknown etiology might best resolve these difficult problems. Part VII outlines the structure as well as the advantages and disadvantages of this proposed system.

II. THE NATURE OF MENTAL DISORDERS

Medical science has identified a broad spectrum of mental disorders.[17] The professional diagnostic nomenclature that attempts clinically to characterize mental conditions correspondingly includes different categories of mental disorders.[18] These categories range from mental conditions that result from structural impairment of brain tissue[19] to psychotic[20] and neurotic[21] conditions and personality dis-

17. In one view of psychodynamic theory, mental illnesses comprise a continuous spectrum that ranges from normal behavior and balanced emotional homeostasis to the most advanced degrees of mental and nervous disorders. Smith, *Problems of Proof, supra* note 8, at 616. For a discussion *contra*, see D. MECHANIC, MENTAL HEALTH AND SOCIAL POLICY 18 (1969); RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

18. The primary source for standard psychiatric diagnosis and nomenclature is the AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter cited as DSM-III]. DSM-III defines mental disorders by comprehensively describing their manifestations. Regarding the predecessor DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968), or DSM-II, Professor Brooks accurately has observed:

> Not all psychiatrists accept the diagnoses [of DSM-II]. Much of this disagreement is of a principled character. Indeed, [DMS-II] itself sometimes acknowledges the controversiality of a position taken there. . . . Psychiatry is a volatile discipline and within the psychiatric profession there is a considerable extent of skepticism as to the usefulness of the nosological or diagnostic system. . . . First, the illnesses listed . . . are not clearly defined. They have no clear-cut symptomatology and they frequently overlap. . . . Second, it is difficult for a psychiatrist to make an accurate diagnosis while the client is in a state of special stress caused by the behavior that has brought him into the legal system.

A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 26-28 (1974 & Supp. 1980).

19. DSM-III begins by describing generally the broad category of Organic Mental Disorders: "The essential feature of all these disorders is a psychological or behavioral abnormality associated with transient or permanent dysfunction of the brain." DSM-III, *supra* note 18, at 101. It then adds:

> Differentiation of Organic Mental Disorders as a separate class does not imply that nonorganic ("functional") mental disorders are somehow independent of brain processes. On the contrary, it is assumed that all psychological processes, normal and abnormal, depend on brain function. Limitations in our knowledge, however, sometimes make it impos-

orders[22] in which organic brain impairment is not present.[23] Medical

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sible to determine whether a given mental disorder in a given individual should be considered an organic mental disorder (because it is due to brain dysfunction of *known* organic etiology) or whether it should be diagnosed as other than an Organic Mental Disorder (because it is more adequately accounted for as a response to psychological or social factors [as in Adjustment Disorder] or because the presence of a specific organic factor has not been established [as in Schizophrenia]).

The organic factor responsible for an Organic Mental Disorder may be a primary disease of the brain or a systemic illness that secondarily affects the brain. It may also be a substance or toxic agent that is either currently disturbing brain function or has left some long-lasting effect. Withdrawal of a substance on which an individual has become physiologically dependent is another cause of Organic Mental Disorder.

Id. at 101-02.

20. DSM-III describes psychosis as:

A term indicating gross impairment in reality testing. It may be used to describe the behavior of an individual at a given time, or a mental disorder in which at some time during its course all individuals with the disorder have grossly impaired reality testing. When there is gross impairment in reality testing, the individual incorrectly evaluates the accuracy of his or her perceptions and thoughts and makes incorrect inferences about external reality, even in the face of contrary evidence. The term psychotic does not apply to minor distortions of reality that involve matters of relative judgment.

DSM-III, *supra* note 18, at 367-68.

21. DSM-III describes a neurotic disorder as

a mental disorder in which the predominant disturbance is a symptom or group of symptoms that is distressing to the individual and is recognized by him or her as unacceptable and alien (ego-dystonic); reality testing is grossly intact. Behavior does not actively violate gross social norms (though it may be quite disabling). The disturbance is relatively enduring or recurrent without treatment, and is not limited to a transitory reaction to stressors. There is no demonstrable organic etiology or factor.

Id. at 364.

The classifications of neurosis are varied and broad in character. "There are a large number of neuroses: anxiety, hysterical, obsessive-compulsive, depressive, and others." A. BROOKS, *supra* note 18, at 39; *see* Comment, *Workmen's Compensation Awards*, *supra* note 2, at 1131-32. Moreover, "[a] neurosis ordinarily prevents a person from functioning rationally and in such a way as to maximize his potential." A. BROOKS, *supra* note 18, at 39. Consequently, any of the various neurotic syndromes "can result in either a partial or total inability of the individual to perform some or all of his normal activities." Comment, *Workmen's Compensation Awards*, *supra* note 2, at 1132.

22. Personality *traits* are enduring patterns of perceiving, relating to, and thinking about the environment and oneself, and are exhibited in a wide range of important social and personal contexts. It is only when *personality traits* are inflexible and maladaptiae and cause either significant impairment in social or occupational functioning or subjective distress that they constitute *Personality Disorders*. The manifestations of Personality Disorders are generally recognizable by adolescence or earlier and continue throughout most of adult life, though they become less obvious in middle or old age.

DSM-III, *supra* note 18, at 305 (emphasis in original). DSM-III expressly recognizes that a clinical finding of a single, specific personality disorder that adequately describes an individual's disturbed personality functioning "can only be done with difficulty, since many individuals exhibit features that are not limited to a single Personality Disorder." *Id.* at 306.

23. Psychosis, neurosis, and personality disorders are the "three basic categories of nonorganic mental illness with which the lawyer is likely to come in contact." A. BROOKS, *supra* note 18, at 37.

authorities generally have characterized all these disorders as "mental"—as opposed to "physical" or "bodily"—because they manifest themselves by mental symptoms, whereas bodily disorders result in symptoms in organic systems other than the brain.[24] The distinction that experts describe between mental and bodily disorders, however, is medically and, arguably, epistomologically erroneous.[25]

The precise etiology of most mental disorders is inexplicable.[26] Mental disorders result from an extraordinarily complex interrelation between an individual's internal or subjective reality and his external or environmental reality.[27] An individual's subjective reality is psy-

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24. *See* Szasz, *The Myth of Mental Illness*, 15 AM. PSYCHOLOGY 113, 113 (1960).

25. As Dr. Selzer states:

> The relation of stress to emotional illness and physical disease . . . may be spurious. Every significant deleterious physical alteration must have an emotional accompaniment or reaction. One does not usually sustain a physical injury or suffer a significant physical illness without some change from the pre-existing emotional state. Similarly, emotional changes often produce a related physiological or metabolic alteration, albeit evanescent, reversible, or as yet undiscovered.

Selzer, *supra* note 2, at 952. *See* Goodrich, *Emotional Disturbance As Legal Damage*, 20 MICH. L. REV. 497, 498-503 (1922); Comment, *Negligently Inflicted Mental Distress*, *supra* note 8, at 1241. Dr. Szasz argues that the distinction reflects an epistemological bias:

> [The] error in regarding complex psychosocial behavior, consisting of communications about ourselves and the world about us, as mere symptoms of neurological functioning is *epistemological*. In other words, it is an error pertaining not to any mistakes in observation or reasoning, as such, but rather to the way in which we organize and express our knowledge. In the present case, the error lies in making a symmetrical dualism between mental and physical (or bodily) symptoms, a dualism which is merely a habit of speech and to which no known ohservations can be found to correspond. . . . In medical practice, when we speak of physical disturbances, we mean either signs (for example, a fever) or symptoms (for example, pain). We speak of mental symptoms, on the other hand, when we refer to a patient's *communications about himself, others, and the world about him*. . . . The statement that "*X* is a mental symptom" involves rendering a judgment. The judgment entails . . . a covert comparison or matching of the patient's ideas, concepts, or believes [*sic*] with those of the observer and the society in which they live. The notion of mental symptom is therefore inextricably tied to the *social* (including *ethical*) *context* in which it is made in much the same way as the notion of bodily symptom is tied to an *anatomical* and *genetic context*.

Szasz, *supra* note 24, at 113-14 (emphasis in original).

26. Medical authorities have universally acknowledged this conclusion, except in cases in which an individual suffers a mental disorder directly as a result of an organic injury to his central nervous system. *See* DMS-III, *supra* note 18, at 6-7; Lesser & Kiev, *supra* note 2, at 241; Smith & Solomon, *supra* note 2, at 113-14.

27. "It is clear . . . that a variety of stresses—personal, social, and environmental—contribute to human mental . . . illness." Selzer, *supra* note 2, at 961. Drs. Lanzer and Michael have observed succinctly that "[t]he multiple causation of a mental disorder in any individual case is always apparent to the clinician. Cases with deceptively simple etiology may turn out to be quite complex in origin." T. LANZER & S. MICHAEL, LIFE STRESS AND MENTAL HEALTH 5 (1963); *see* L. KOLB & A. NOYES, MODERN CLINICAL PSYCHIATRY 116 (7th ed. 1968); A. LEIGHTON, *Mental Illness and Acculturation*, in MEDICINE AND ANTHROPOLOGY 121-22 (1959); J. TITCHENER & W. ROSS, 3 AMERICAN HANDBOOK OF PSYCHIATRY 44 (2d ed. 1974); Brill, *supra*

chogenic; its roots may lie in his experience or in his organic or genetic disposition.[28] An individual's external or environmental reality includes the gamut of potential social stresses and, if the individual is employed, the stresses of his work environment.[29]

The precise psychogenesis of an individual's subjective reality is impossible to determine.[30] Moreover, the interrelation between subjective and environmental realities is so profoundly complex that no method exists either to quantify or to qualify the extent to which one reality and not the other is a cause of mental disorder.[31] Therefore, the time lapse between an external stress and the manifestation of mental disorder symptoms, and the intensity, suddenness, or gradualness of the external symptoms are irrelevant in determining cause.[32] The impossibility of measuring the contributing causes of a mental disorder undoubtedly is the source of the artificial distinction between mental and bodily disorders. When mental disorder symptoms appear in parts of the body other than the brain, medical science is able, in most cases, to attach a quantitative or qualitative etiological probability. Scientists cannot make this determination, however, when the symptoms manifest themselves subjectively.[33] An individual who suffers a mental disorder has an *a priori* personal, subjective vulnerability or predisposition to the disorder.[34] This pre-

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note 2, at 300; Smith & Solomon, *supra* note 2, at 90; Comment, *Workmen's Compensation Awards*, *supra* note 2, at 1142.

28. *See* A. LEIGHTON, *supra* note 27; Smith, *Problems of Proof*, *supra* note 8, at 591-92; Comment, *Workmen's Compensation Awards*, *supra* note 2, at 1142.

29. The definition of stress is "any circumstance, situation, or event that causes or accelerates the development of human emotional or physical disability or disease." Selzer, *supra* note 2, at 951. Social stresses include "conflicting emotions and desires, fears and worries, and anxieties in ordinary civilian circumstances" such as "discontent with a job, fear of losing one's income, unsatisfactory marital relations, lack of good social adjustments, and almost any variety of mal-adjustment." Smith & Solomon, *supra* note 8, at 98.

30. *See* Comment, *Workmen's Compensation Awards*, *supra* note 2, at 1142.

31. Psychiatry has not advanced to the point where it is an exact science in the same sense that physical medicine is an exact science. A physician . . . is able to declare positively whether or not [an individual] has a fracture. He can even describe its duration and severity in detail. Psychiatry, on the other hand, cannot be so positive about neuroses and mental illness . . . [because it must take] cognizance of all the influences that have come to bear on the individual throughout his lifetime.

Smith, *Problems of Proof*, *supra* note 8, at 633 n.138; *see* T. LANZER & S. MICHAEL, *supra* note 27, at 1142-43; Brill, *supra* note 2, at 300.

32. Selzer, *supra* note 2, at 955-56; Comment, *Workmen's Compensation Awards*, *supra* note 2, at 1139-40. The existence of a physical stress element does not assure an etiological relationship. *Id.* at 1137-38.

33. Smith, *Problems of Proof*, *supra* note 8, at 633 n.138.

34. *See id.* at 591-92; Comment, *Negligently Inflicted Mental Distress*, *supra* note 8, at 1257. Experts have verified empirically that persons with mental disorders possess a vulnerability to the disorder. *See* Smith & Solomon, *supra* note 2, at 281-82, 303; Comment, *Negligently*

disposition is an etiologically crucial factor;[35] its existence raises an important corollary problem. Although mental injuries medically are as genuine as physical disorders,[36] their subjective quality creates the possibility that the individual may feign a mental disorder.[37] The spectre of fraud has influenced judicial attitudes toward mental injuries.[38]

III. Common-Law Tort Recovery for Mental Distress

A. *Interests in Freedom from Mental Distress*

Courts have recognized certain common-law causes of action in which a plaintiff is entitled to independent protection from conduct that results in mental distress. The important analytical denominator in these actions is the existence of limiting, qualifying standards, which the judiciary imposes and expresses as prima facie elements of an action. These limiting standards directly reflect policy choices.[39]

Inflicted Mental Distress, supra note 8, at 1257.

35. Smith & Solomon, *supra* note 2, at 90; *see supra* note 34 and accompanying text.

36. *See* Smith & Solomon, *supra* note 2, at 113; Comment, *Negligently Inflicted Mental Distress, supra* note 8, at 1258; Comment, *Workmen's Compensation Awards, supra* note 2, at 1132, 1137.

37. *See* Restatement (Second) of Torts § 46 comment b (1965); Smith & Solomon, *supra* note 2, at 99. Psychiatric literature uses the term "malingering" to describe the couscious counterfeiting of a mental condition. Experts also recognize that "[t]he borderline between neurosis and malingering is tenuous and uncertain." Turner, *The Anatomy of Psychiatric Cross-Examination,* in Psychiatry for Lawyers Handbook 89, 95 (J. Arrowsmith ed. 1966). *See* 13 W. Malone & H. Johnson, *supra* note 2, § 262; Keschner, *Simulation of Nervous and Mental Disease,* 44 Mich. L. Rev. 715 (1946); Smith, *Problems of Proof, supra* note 8, at 614; Smith & Solomon, *supra* note 2, at 125; Usdin, *Neurosis Following Trauma,* in Law, Medicine, Science—and Justice 237, 244 (L. Bear ed. 1964); Comment, *Workmen's Compensation Awards, supra* note 2, at 1146.

38. *See infra* notes 45, 47, 51, 57, 105-06, 112, 133, & 166 and accompanying text.

39. At the beginning of the twentieth century courts began to recognize the right of patrons of common carriers and other public utilities to be free from emotional distress that resulted from the insults of employees of the carrier or utility. *See* 1 F. Harper & F. James, *supra* note 8, § 9.3, at 670-73; W. Prosser, *supra* note 8, § 12, at 52-53; Restatement (First) of Torts § 48 (1934); Magruder, *supra* note 8, at 1050-54. Prior to the recognition of a protected interest in freedom from emotional distress, conduct that caused mental distress was actionable only under an assault theory. 1 F. Harper & F. James, *supra* note 8, § 9.1, at 666; Magruder, *supra* note 8, at 1059. The rationales for the new cause of action revealed two competing policy considerations. First, courts recognized an interest in decent, courteous service for patrons of common carriers and other utilities. This interest entitled patrons to protection against conduct that the common carriers reasonably could calculate would produce emotional distress. *See* 1 F. Harper & F. James, *supra* note 8, § 9.3, at 671-72; Magruder, *supra* note 8, at 1051. Second, courts implicitly recognized the subjective dimension of emotional injuries by requiring that the defendant's misconduct be objectively abusive and that the plaintiff's emotional injury be reasonable compared to the abusive conduct. The latter limitation undermined the legal effect of an individual plaintiff's subjective vulnerability to emotional injury, by measuring the emotional injury with a reasonable person standard. Also, the requirement that the

Judicially imposed limiting standards in mental injury tort ac-

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insulting conduct be objectively abusive added an analytical assurance tbat a reasonable person would have suffered emotional distress. Both requirements reflected the courts' attempt to guard against fraudulent emotional distress claims and to prevent recovery for emotional distress so subjective in nature that it was "unreasonably" trivial. W. PROSSER, *supra* note 8, § 12, at 54; *see* RESTATEMENT (SECOND) OF TORTS § 46 comment b (1965). Courts extended the liability principles applicable to common carriers and public utilities to innkeepers and hotel owners for humiliation and insults arising from conduct of their employees—a situation in which the relation of the parties entitled the patron to respectful and decent treatment. *See* F. HARPER & F. JAMES, *supra* note 8, § 9.3, at 673; W. PROSSER, *supra* note 8, § 12, at 53.

Courts next began to recognize actions concerning language that was insufficiently abusive to constitute assault but so insulting and abusive that it objectively resulted in mental distress. In these cases, however, physical illness had to accompany mental distress. *See* 1 F. HARPER & F. JAMES, *supra* note 8, § 9.2, at 668-69; RESTATEMENT (FIRST) OF TORTS § 46 (1934). Here too, the courts intended the requirements that the plaintiff physically manifest his mental suffering and that a person reasonably would expect the distress as a result of the abusive quality of the insults as policy measures to assure both the genuineness of the claim and its social worthiness. *See* RESTATEMENT (SECOND) OF TORTS § 46 comment k (1965).

These causes of action provided the analytical and policy bases for the recoguition of an action for objectively severe mental distress arising from extreme and outrageous conduct of another that is intentional or reckless. *See* 1 F. HARPER & F. JAMES, *supra* note 8, § 9.1, at 667-68. The *Restatement (First) of Torts* first formally recognized this action providing that "[o]ne who, without privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress and (b) for bodily harm resulting from it." RESTATEMENT (FIRST) OF TORTS § 46 (Supp. 1948). The *Restatement (Second) of Torts* now provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). In addition, the *Restatement (Second) of Torts* provides standards for determining liability when one recklessly or intentionally directs extreme and outrageous conduct at a third person. *Id.* § 46(2). The *Restatement (Second) of Torts* also states that "[t]he [emotional] distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge." *Id.* § 46 comment j; *see id.* § 46 comment f. A clear majority of jurisdictions have adopted this cause of action. *See* W. PROSSER, *supra* note 8, § 12, at 59.

Like the abusive common carrier cause of action, the cause of action for mental distress reflects competing policies. On the one hand, it fills the technical gap between assault and the action that permits recovery for emotional distress when a special relationship exists. *See* RESTATEMENT (SECOND) OF TORTS §§ 46 comment b, 48 (1965); 2 F. HARPER & F. JAMES, *supra* note 8, § 9.1, at 666. On the other hand, the purpose of the different elements in a mental distress actions—requirements that the conduct be intentional or reckless, objectively extreme and outrageous, and that the emotional injury be objectively severe as compared to the misconduct—is to assure that the plaintiff's injury is not fraudulent and is worthy of social protection. *See* W. PROSSER, *supra* note 8, § 12, at 51; RESTATEMENT (SECOND) OF TORTS § 46 comment b (1965).

Courts almost universally have adhered to the position that a plaintiff's mental distress alone is insufficient to give rise to a cause of action in negligence. *See* 2 F. HARPER & F. JAMES, *supra* note 8, § 18.4; RESTATEMENT (SECOND) OF TORTS §§ 312, 313, 436, 436a (1965); Comment, *Negligently Inflicted Mental Distress, supra* note 8. *But see* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974). Courts have been aware of the proof problems that exist concernuig both the genuineness of the injury and the causal relationship between a defendant's negligence and the injury, given the subjective dimension of mental injuries. Courts also have denied liability

tions embody two primary policy choices: the choice to minimize the risk of fraud and the choice to guarantee the genuineness of the injury.[40] The apparent importance of these policies, however, is misleading. In mental injury tort actions that concern extreme and outrageous conduct which is intentional or reckless, for example, the outrageousness of the misconduct, the injury's severity, and the reasonableness of the injury compared to the misconduct, do not guarantee the genuineness of a mental injury.[41] The judicially imposed limiting standards in these actions, therefore, only provide the appearance of genuineness.[42] Moreover, in actions that concern negligent infliction of mental distress, the physical injury requirement, the requirement that the injury be reasonable vis-à-vis the misconduct, and the physical impact requirement only assure the appearance of

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because the triers have viewed the emotional injuries as too trivial compared with a defendant's negligent misconduct to warrant recovery. *See* 2 F. HARPER & F. JAMES, *supra* note 8, § 18.4, at 1032; McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 33 (1949); Smith, *Relation of Emotion to Injury and Disease, supra* note 8, at 208. Courts have implemented these policies through their treatment of the elements of a negligence action—duty, proximate (or legal) causation, and remoteness of damage requirements. *See* 2 F. HARPER & F. JAMES, *supra* note 8, § 18.4, at 1033, 1035-39; Smith, *Relation of Emotion to Injury and Disease, supra* note 8, at 208-12.

Courts generally have permitted recovery for emotional distress in a negligence action when physical or bodily injury accompanies the distress. *See* RESTATEMENT (SECOND) OF TORTS §§ 313, 436 (1965); Comment, *Negligently Inflicted Mental Distress, supra* note 8, at 1240-42. Courts have recognized that recovery for emotional distress in this instance is essentially "parasitic." *See* 2 F. HARPER & F. JAMES, *supra* note 8, § 18.4, at 1032; Comment, *Negligently Inflicted Mental Distress, supra* note 8, at 1240. Originally, courts did not allow recovery unless the defendant's negligence also generated a physicial trauma or impact on the plaintiff that hrought on his emotional and bodily illness. *See* 2 F. HARPER & F. JAMES, *supra* note 8, § 18.4, at 1032-33; Smith, *Relation of Emotion to Injury and Disease, supra* note 8, at 207-12. Courts expressly rooted the "impact requirement" in the policy of providing a "guaranty of merit to counterbalance risks of fraud." Judges located the impact requirement in the duty or proximate causation elements of the action. *See* 2 F. HARPER & F. JAMES, *supra* note 8, § 18.4, at 1033.

A majority of jurisdictions have repudiated the impact requirement. *See* W. PROSSER, *supra* note 8, § 54, at 332-33; RESTATEMENT (SECOND) OF TORTS §§ 312 comment d, 313 comment c (1965). Even if courts reject this requirement, however, a plaintiff's emotional and hodily injury still must be reasonable compared to defendant's conduct. The purpose of the reasonableness requirement is to counterbalance "risks of fraud" in a less mechanical fashion than does the impact requirement. Its effect is to disallow consideration of the suhjective dimension of the individual plaintiff's emotional and physical illness.

40. *See supra* note 39 and accompanying text.

41. *See supra* notes 30-32 & 39 and accompanying text.

42. Courts have articulated another policy rationale for the limiting criteria in mental injury actions dealing with intentional or outrageous misconduct that is more creditable than tbe "appearance of genuineness" argument: that some mental disorders are not socially worthy of legal protection. *See supra* note 39 and accompanying text. Under the "social worthiness" rationale, the law entitles to protection only disorders that are objectively severe, or reasonahle, disorders. When the disorder does not meet these objective criteria, the court considers as a matter of policy that a mental injury is too subjective, or trivial, to warrant protection.

genuineness. These qualifying standards cannot guarantee that an injury is real because physical manifestations of a mental injury medically do not assure genuineness, and the nature and intensity of an alleged causal stimulus or the reasonableness of the injury are irrelevant to the origins of the injury.[43]

The judge decides whether the plaintiffs have met the limiting prima facie standards in actions for mental distress. If a court finds that reasonable persons would not differ concerning whether the plaintiff has satisfied each requirement, it chooses, in an evaluative policy decision, to exclude the plaintiff's claim by nonsuiting it. If, however, a court finds that reasonable persons might disagree in their judgments, the court passes its initial evaluative decision to the jury for ultimate determination.[44] The policy decisions in common-law mental injury cases, therefore, occur within the appropriate domains of the court and jury in the same manner in which judges and juries make threshold policy based determinations in other types of cases.[45]

B. *Factual Causation and Mental Distress*

The determination whether the defendant's misconduct has caused the plaintiff's injury in a factual sense is an element of every personal injury action.[46] The difficulty in establishing factual causation is epistemological: the trier of fact never absolutely can determine the "fact" of causation.[47] Although the jury makes the ultimate

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43. *See supra* notes 30-32 & 39 and accompanying text. The more accurate policy rationale for the prima facie limitations is that mental injuries which arise from negligent conduct and which do not satisfy these limiting conditions are unworthy of legal protection. *See supra* note 39 and accompanying text.

44. *See* RESTATEMENT (SECOND) OF TORTS §§ 46 comments h, j, 328B, 328C (1965).

45. For a discussion whether the court should decide the policy standards, see R. KEETON, *supra* note 12, at 3-63, 147-66; Theis, *The Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DE PAUL L. REV. 275 (1977).

46. *See* P. ATIYAH, ACCIDENTS COMPENSATION AND THE LAW 123 (1970); 2 F. HARPER & F. JAMES, *supra* note 8, § 20.2, at 1110; RESTATEMENT (SECOND) OF TORTS §§ 430 comment e, 431 comment e (1965).

47. Philosophers of science have produced extensive literature on this point. *See* M. BUNGE, CAUSALITY AND MODERN SCIENCE 132-33 (3d ed. 1979); E. WAGEL, THE STRUCTURE OF SCIENCE, ch. 10 (1961).

The proof of a factual causal relation must depend entirely upon probabilities. Human experience—often supported in the courtroom by expert testimony—dictates tbat certain phenomena cluster in groups: when fact *A* is presented, fact *B* accompanies it. The existence of a causal relation, therefore, "can be nothing more than 'the projection of our habit of expecting certain consequences to follow certain antecedents merely because we [have] observed these sequences on previous occasious.'" W. PROSSER, *supra* note 8, § 41, at 242 (footnote omitted); *see* 13 W. MALONE & H. JOHNSON, *supra* note 2, § 252, at 546.

The concept of "probability" is as elusive philosophically as the concept of "causation." According to Professor Chisholm, an argument is inductively probable when "[t]wo proposi-

determination of factual causation, like other factual questions,[48] the court plays a crucial role in the process. Generally, the trier of fact establishes causation in accord with noncommunicative formulas that

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tions, *c* and *h*, may he so related logically that the proposition *h* may be said to be probable—that is, more probable than not—in relation to proposition *c*." R. CHISHOLM, THEORY OF KNOWLEDGE 8 (1966). Professor Chisholm defines absolute probability as follows: "A proposition *h* is probable in the absolute sense for a given subject S, provided that *h* is probable in the inductive sense, in relation to the conjunction of all those propositions that S knows to be true." *Id.* at 9. Because factual causation determinations are made within the respective domains of judges and juries, Professor Chisholm's statement more accurately should refer to the conjunctions of all propositions that S *believes* to be true. Indeed, jury instructions generally invoke a coherence theory of truth, in which the judicial system asks jurors to believe those propositions that are consistent with the set of beliefs the jurors already hold. *Id.* at 113 n.16. The evidence that plaintiffs utilize to prove factual causation in mental injury cases also follows a kind of coherence theory because the plaintiffs use evidence to explain behavior within the framework of given values or beliefs.

The standard that courts utilize most frequently to assure that one event is antecedent to another is the "but-for" test: society should not charge the defendant with responsibility for the plaintiff's injury unless the judicial system can conclude that the injury could not have occurred in the absence of the defendant's misconduct. *See* ATIYAH, *supra* note 8, § 41, at 238-40; 2 F. HARPER & F. JAMES, *supra* note 8, § 20.2, at 1110; Malone, *supra* note 2, at 63-67. The "but-for" test, however, is laden with philosophical and analytical problems. From a philosophical perspective, "[t]he essential weakness of the 'but-for' test is the fact that it ignores the irresistible urge of the trier to pass judgment at the same time that it observes. It is an intellectual strait jacket to which the human mind will not willingly submit." Malone, *supra* note 2, at 66-67 (footnote omitted); *see* D. HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING § V, pt. I (1748). Furthermore, application of the test can pose analytical difficulties. F. HARPER & F. JAMES, *supra* note 8, § 20.2, at 1110. The two main types of cases in which these difficulties arise are: First, "cases of omissions, in which the enquiries into what would have happened are inescapable and difficult under the 'but for' test," and second, cases concerning multiple causal factors. ATIYAH, *supra* note 2, at 67, 89-97; W. PROSSER, *supra* note 8, § 41, at 239-41.

Professor Malone has concluded that decisions which courts make about causation as a result of applying the but-for test rest not on scientific causation but rather on judgmental, evaluative principles. Malone, *supra* note 2, at 97-99; *see* N. GOODMAN, FACT, FICTION AND FORECAST 9 (1965). The *Restatement (Second) of Torts,* accordingly, has declared that the defendant's misconduct must also be a "substantial factor" in bringing about the plaintiff's injury. *See* RESTATEMENT (SECOND) OF TORTS, §§ 431, 432 (1965). The "substantial factor" requirement includes the "necessary antecedent" concept of the but-for test except "[i]f two forces are actively operating, one because of the actor's [conduct], the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another. . . ." *Id.* § 432. The but-for test is necessary but not sufficient to prove the existence of a "substantial factor" causal relation. *Id.* § 431 comment a.

Professors Hart and Honore have criticized the use of the substantial factor standard because it is not definable or reducible into lesser terms. H. HART & A. HONORE, CAUSATION IN THE LAW 216-18, 263-66 (1959). Dean Green, however, in response to their argument, has stated that given the use of the standard within the context of "the procedural apparatus of the litigation process in allocating the functions of judge and jury," reducing the term further is neither necessary nor desirable. Green, *The Causal Relation Issue in Negligence Law,* 60 MICH. L. REV. 544, 554 (1962).

48. *See* L. GREEN, THE RATIONALE OF PROXIMATE CAUSE 135 (1927); W. PROSSER, *supra* note 8, § 41, at 237; RESTATEMENT (SECOND) OF TORTS § 434 (1965); Malone, *supra* note 2, at 60-61.

measure the quality or quantity of required proof in terms of probabilities.[49] In most cases the factual probabilities preponderate so clearly that the court need not submit the causation issue to the jury.[50] Exceptions to this generalization exist, however. "[W]henever the judicial process demands an answer to the unknowable . . . the wide range of language makes it possible for the judge to exclude the jury from participation or to enlist its full and conclusive service, just as he may see fit."[51] In these cases a judge's evaluation of the probabilities of a factual causation controversy is tremendously important. The court's intuitive evaluation takes into account not only moral, social, and economic beliefs and attitudes, but also an attitude toward the purposes of accident compensation law.[52]

In mental injury cases neither common sense nor expert testimony provides data that antecedently can associate the plaintiff's injury with the defendant's conduct on a more-probable-than-not basis.[53] Because no one fully understands the causal elements in mental injuries, the evaluative latitude of a court in the factual causation inquiry in these cases is extraordinarily broad. In every mental injury case a court may find that the factual probabilities do not preponderate to the degree that a reasonable difference of opinion exists whether the defendant's conduct caused the plaintiff's mental injury. Thus, a court potentially could declare a nonsuit in every mental in-

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49. *See* W. PROSSER, *supra* note 8, § 41, at 241. One noncommunicative formula, for example, is: "[The plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result." *Id.*; *see* RESTATEMENT (SECOND) OF TORTS § 433B comment b (1965); Malone, *supra* note 2, at 68; Note, *Causation in Disease: Quantum of Proof Required to Reach the Jury*, 53 NW. L. REV. 793 (1959). In addition, a common description of the appropriate measurement of proof is that the plaintiff must prove the causation standard by "the preponderance of the evidence." Green, *supra* note 47, at 554; *see* Malone, *supra* note 2, at 68. According to Professor Malone, however,

> [w]henever tbe judge has concluded that the showing on the issue of cause is not sufficient to warrant a submission to the jury, he is likely to emphasize that there is a sharp distinction between a 'mere possibility' and a showing of 'probability' or 'reasonable probability.' . . . On the other hand, whenever the court is willing to accept the judgment of the jury on the cause issue, it will not encounter the slightest difficulty in finding acceptable and convincing language to justify the refusal of a nonsuit. Instead of emphasizing the distinction between 'possibilities' and 'probabilities' the judge will likely call attention to the fact that no inference can be proved to a certainty. It is enough that it is 'reasonable.'

Id. at 68-69.

50. *See* Malone, *supra* note 2, at 71.

51. *Id.* (footnote omitted).

52. *Id.* at 62-64; *see* Green, *supra* note 47, at 555; Small, *supra* note 2, at 651-59. For a discussion of the relevance of these analytical phenomena of factual causation to workers' compensation mental injury cases, see *infra* notes 202-04 and accompanying text.

53. *See supra* note 31 and accompanying text.

jury claim on the factual causation issue. In each case, however, a court also may reach the opposite result—finding that the factual probabilities do preponderate to the extent that a reasonable difference of opinion exists whether the defendant's conduct caused the plaintiff's mental injury. Because the court has enormous latitude in its preponderance of the evidence finding, the factual causation issue in every mental injury case potentially could be an issue for the jury's determination.[54]

The factual causation issue, however, has not surfaced as a focal issue in mental injury cases because the determination whether the plaintiff's injury is reasonable conceptually assimilates the factual causation inquiry.[55] In causes of action that recognize an independent interest in freedom from mental distress and even in negligence actions concerning mental distress, courts commonly apply a policy based limitation that the plaintiff's injury must be "reasonable" in relation to the defendant's misconduct.[56] As a practical matter, the limitation means that if a court nonsuits a plaintiff or directs a verdict against him on the policy ground that his injury is unreasonable vis-à-vis the defendant's misconduct, the court implicitly asserts a belief that the defendant's misconduct was not in a more-probable-than-not sense a cause of the plaintiff's injury. If, however, a court finds that a reasonable difference of opinion exists about the reasonableness of the plaintiff's injury and lets the issue go to the jury, the court implicitly adjudges a reasonable difference of opinion regarding the factual causation issue. The judge or the jury, therefore, makes the same policy choices in both the factual cause and "reasonable-

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54. *See* Green, *supra* note 47, at 553-54; Malone, *supra* note 2, at 68-72; *supra* note 49 and accompanying text.

55. The *Restatement (Second) of Torts'* description of the standard for causation in negligently inflicted emotional and physical injury cases implicitly suggests this conclusion. In elaborating on the "substantial factor" standard stated in §§ 431-432, the *Restatement* comments:

> While it is necessary that the negligent conduct be a substantial factor in bringing about the fright and that the fright also be a substantial factor in bringing about the illness, it is not necessary that the fright be a probable result of the negligence nor the illness a probable result of the fright. It is enough that it is a 'natural' result, using that word as denoting that men of ordinary experience and judgment would not regard the result as extraordinary, after expert testimony has given them the medical information necessary to enable them to form an intelligent opinion.

RESTATEMENT (SECOND) OF TORTS § 436 comment d (1965); *see id.* §§ 431-432. This causation standard has an identical analytical effect to the requirement that the plaintiff's mental and physical illness be reasonable as compared to the defendant's misconduct. Therefore, if the plaintiff's case satisfies the reasonableness requirement, it a fortiori satisfies the causation standard. *See* Brody, *supra* note 8, at 260.

56. *See supra* note 39 and accompanying text.

ness" determinations. The court may decide the issues initially or refer them to the jury, but in either situation the basis of decision is the probable relation between the defendant's misconduct and the plaintiff's mental injury.[57]

IV. Workers' Compensation Mental Disabilities: The Causation Issue

A. *The Purpose and Structure of Workers' Compensation Systems*

Workers' compensation systems are bottomed on political compromise.[58] The employer, through the mechanism of insurance, bears the initial cost of injuries that result from employment related risks and waives the immunity it might otherwise enjoy if it were not at fault. The employee, in turn, surrenders his common-law right to sue in tort when an employment related risk creates his injury. Instead, the employee receives legislatively determined compensation benefits.[59] The compromise between employer and employee embodies the central policy of the compensation system.[60]

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57. To resolve the factual causation issue in mental injury cases, either the court or the jury must engage in the evaluative process of determining whether the defendant's part in the occurrence of the plaintiff's injury was sufficient to create an appearance that the defendant *ought* to pay for the injury. The effect of this process is essentially distributive: if a judge decides, based on his initial evaluative judgment, to allow the jury to decide the factual causation issue, he is permitting the jury to form *its* moral, social, or economic judgment about which party should bear the cost of the plaintiff's emotional injury. Malone, *supra* note 2, at 98-99.

58. For an excellent analysis of the sociopolitical background of the enactment of workers' compensation statutes, see Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Colum. L. Rev. 50 (1967). The authors concluded:

> In essence . . . workmen's compensation was designed to replace a highly unsatisfactory system with a rational, actuarial one. It should not be viewed as the replacement of a fault-oriented compensation system with one unconcerned with fault. It should not be viewed as a victory of employees over employers. . . . [The] system was itself a compromise: an attempt at a new, workable, and predictable mode of handling accident liability which neatly balanced the interests of labor and management.

Id. at 71-72. For a discussion of the employer's common-law defenses prior to the enactment of workers' compensation statutes (the "unholy trinity" of contributory negligence, assumption of the risk, and the fellow-servant rule), the sociolegal dimensions of tort claims and industrial accidents, and the historical development of workers' compensation legislation, see 1 A. Larson, *supra* note 2, §§ 4.00-5.30; 13 W. Malone & H. Johnson, *supra* note 2, §§ 3, 31; Compendium, *supra* note 2, at 11-19; Rabin, *Some Thoughts on Tort Law From a Sociopolitical Perspective*, 1969 Wis. L. Rev. 51, 53, 60-66.

59. 13 W. Malone & H. Johnson, *supra* note 2, § 32.

60. The system's compromise—or *quid pro quo*—between employers and employees is also the system's *purpose*; the primary legislative intent of a workers' compensation system is to regulate statutorily the allocation of losses that result from employment related injuries. Commentators have discussed extensively various justifications for the system's primary purpose. Writers most often explain the employer's trade-off in economic terms:

The structure of workers' compensation systems evolves from this compromise. Every system contains two basic limitations to recovery. First, an employee must suffer a "personal injury by accident arising out of and in the course of the employment."[61] This legislative standard is the system's "coverage formula,"[62] and is the primary method by which the legislature defines employment related risks.[63] Second, an employee's injury must result in a disability that entails total or partial incapacity to work. Generally, workers' compensation

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> The expected cost of injury or death to workers can be anticipated and provided for in advance through the medium of insurance, and the premiums can be regarded as an item of production cost in fixing the price of the commodity or service.
>
> Under this approach the element of personal fault either disappears entirely or is subordinated to broader economic considerations. The employer absorbs the cost of accident loss only initially; it is expected that this cost will eventually pass down the stream of commerce in the form of increased price until it is spread in dilution among the ultimate consumers.

Id. (footnote omitted); *see* COMPENDIUM, *supra* note 2, at 21-23. Proponents of this rationale expect workers' compensation systems to

> allocate the costs of the program among employers and industries according to the extent to which they are responsible for the losses to employees and other expenses. Such an allocation is considered equitable by supporters of this objective because each employer and industry pays for its fair share of the cost. The economic effects are considered desirable because this allocation tends in the long run in a competitive economy to shift resources from hazardous industries to safe industries and from unsafe employers within an industry to safe employers.

COMPENDIUM, *supra* note 2, at 25. The employee's trade-off is justifiable from a "broad economic viewpoint":

> [P]redictability and moderateness of cost are necessary from the broad economic viewpoint. . . . [T]hese are also desirable from the personal point of view of [the] worker. . . . The great need of the employee is for immediate cash to meet his emergency. If the amount of his claim is likely to be disputed, the delays of the old system and the inequities of compromise will be resurrected and one of the human purposes of compensation will be lost. Furthermore, if the worker is to be guaranteed at least a minimum sum to care for medical expense and support for each and every accident, it is perhaps not unfair that he should forego his former claim to be fully remunerated for pain and suffering and those intangible elements that go into the makeup of a conventional damage suit.

13 W. MALONE & H. JOHNSON, *supra* note 2, § 32; *see* H.E. DOWNEY, WORKMEN'S COMPENSATION 35 (1924); COMPENDIUM, *supra* note 2, at 24-26; Gregory & Gisser, *Theoretical Aspects of Workmen's Compensation*, in SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 107 (1973); Larson, *Basic Concepts & Objectives of Workmen's Compensation*, in SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 31, 33-37 (1973).

61. *See supra* note 3 and accompanying text.

62.
> By moving from a fault to a no-fault system, one does not escape problems of causal relation. . . . If . . . one accepts the premise that certain activities—like . . . industrial activity—should pay their own way in terms of accident costs, then some test must be employed to distinguish those accidents that are caused by the activity from the remainder of injury causing activities in the world.

J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 362 (1975).

63. *See infra* note 71 and accompanying text.

systems measure disability according to the employee's impaired earning capacity.[64] The disability requirement also reflects the system's attention to compensation of only employment related loss.

Legislatures usually charge administrative agencies with effectuating the policies of workers' compensation systems.[65] The agencies generally include administrative law judges, who handle the administrative trial process, and an administrative appeal board, which hears initial appeals.[66] Workers can make secondary appeals to legislatively designated courts,[67] subject to appellate review principles that the judiciary or the legislature has adopted.[68] The purpose of the system's administrative structure is to implement the underlying policy justification for the employee's trade-off: theoretically, a decisionmaking process specifically designed to resolve workers' compensation claims provides efficient and prompt payment to the disabled employee in immediate need.[69]

B. The Causation Inquiry

1. Policy or Legal Causation

Under the common law, courts have the exclusive power to define the policy limits of tort liability.[70] In workers' compensation systems, however, courts must decide whether an injury is employment related based on the legislative directives that the coverage formula

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64. 2 A. LARSON, *supra* note 2, § 57.00. For an extensive discussion of issues relating to what constitutes disability, see *id.* §§ 57.10-.66.

65. *See* 1 A. LARSON, *supra* note 2, § 1.10; W. MALONE, M. PLANT & J. LITTLE, *supra* note 2, at 400.

> [T]here are still five states that continue to rely on court administration of the law. . . . [F]our of the states (Alabama, New Mexico, Tennessee and Wyoming) provide an agency with limited powers of enforcement and functions such as compiling statistics, publication of forms, filing notices and similar more or less clinical work. Louisiana has no administrative agency whatsoever and relies entirely on court administration and tbe litigation process.

Id.; *see* COMPENDIUM, *supra* note 2, at 34-35. For a discussion of the effect of court administration on workers' compensation mental disability cases, see *infra* note 228 and accompanying text.

66. *See* 3 A. LARSON, *supra* note 2, § 80.12; W. MALONE, M. PLANT & J. LITTLE, *supra* note 2, at 412.

67. *See* 3 A. LARSON, *supra* note 2, § 80.10; 4 A. LARSON, *supra* note 8, at app. A, table 20; W. MALONE, M. PLANT & J. LITTLE, *supra* note 2, at 412.

68. *See infra* notes 96-99 and accompanying text.

69. For a discussion of the efficiency justification, see W. MALONE, M. PLANT & J. LITTLE, *supra* note 2, at 400-01; COMPENDIUM, *supra* note 2, at 34-35; *supra* note 60.

70. *See* ATIYAH, *supra* note 46, at 132; 2 F. HARPER & F. JAMES, *supra* note 8, §§ 18.1-.8, 20.4; H. HART & A. HONORE, *supra* note 47, at 230-76; Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 223, 247-49, 303, 320 (1912).

expresses. The coverage formula, therefore, is the primary "policy" or "legal" causation formula in workers' compensation systems.[71]

Courts generally have interpreted the policy limits of the coverage formula by applying two concepts: Whether the employee suffered an "accidental injury,"[72] and whether the injury arose "out of" the employment.[73] The "accidental injury" concept has provoked intense controversy since the inception of the workers' compensation system.[74] Two variations of the concept have evolved. The first position, prevalent in the earliest judicial opinions, is that to fulfill the requirement of "accidental injury," an unusual and unexpected external event must have occurred contemporaneously with the injury. In addition, the worker must have sustained the injury at a definite, reasonably ascertainable time.[75] Commentators have criticized the requirement of an unusual and unexpected external event as an artificial interpretation that courts have applied in order to ensure that a

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71. The crucial difference between the metbod of formulating policy limits into legal formulas under the tort system and under the workers' compensation system is that in the workers' compensation system the legislature defines policy limits. The legislature's statutory directive, therefore, limits the judiciary's power to formulato policy in workers' compensation cases. *See* Malone, *The Limits of Coverage in Workmen's Compensation—The Dual Requirement Reappraised,* 51 N.C.L. REV. 705-17 (1973). No such jurisprudential limitation exists under the tort system: the judiciary is free to formulate whatever policy formulas it desires to limit recovery. In fact, the important critical debates about "duty" and "proximate cause" have centered on the choice of appropriate formulas to reflect policy considerations. *See* ATIYAH, *supra* noto 46, at 132-33.

In addition to the coverage formula, legislatures have included secondary policy formulas in every workers' compensation act. These formulas reflect a legislative intent to define explicitly the character of risks to which the system applies. The most apparent example of secondary policy formulas is the "occupational disease" provision, which appears in various forms in every state act. *See* 1A A. LARSON, *supra* note 2, §§ 41.00-.20. Historically, occupational disease provisions developed because "the concept of accidental injury left substantial gaps in the protection afforded disabled workers." *Id.*; *see* 1A A. LARSON, *supra* note 2, § 41.31. For a discussion of the accidental injury concept, see *infra* notes 74-78 and accompanying text.

Other examples of secondary policy formulas include statutory provisions relating to hernias, *see, e.g.,* MICH. COMP. LAWS ANN. § 418.401(c) (1978); hearing loss, *see, e.g.,* WIS. STAT. ANN. § 102.555 (West 1974), N.Y. WORK. COMP. LAW § 3A (McKinney 1965); radiation disease, *see, e.g.,* NEV. REV. STAT. § 617.455 (1981); and silicosis, *see, e.g.,* IOWA CODE ANN. § 85A.13 (West 1946). Michigan has enacted a specific statutory provision relating to mental disability. MICH. COMP. LAWS ANN. §§ 418.301(2), 401(c) (Supp. 1980-81) (as amended by 1980 Mich. Pub. Acts 357, §§ 301(2), 401(c)). For a discussion of this approach, see *infra* notes 233-35 and accompanying text.

72. *See infra* notes 74-78 and accompanying text.

73. *See infra* notes 80-85 and accompanying text.

74. *See* 1A A. LARSON, *supra* note 2, § 37.20; W. MALONE, M. PLANT & J. LITTLE, *supra* note 2, at 231-53; COMPENDIUM, *supra* note 2, at 181; Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts,* 25 HARV. L. REV. 328, 337 (1912).

75. *See* 1B A. LARSON, *supra* note 2, § 37.20; W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 235-36, 242-44.

factual causation relation exists between employment and the injury.[76] The second position states that plaintiffs satisfy the "accidental injury" requirement if the *result* of the injury is unexpected or develops gradually over a substantial period of time.[77] This approach, which commentators favor and which a majority of jurisdictions have adopted, does not limit recovery to traumatically caused injuries.[78] As a result of the majority position, decisionmakers in workers' compensation cases address policy and factual causation controversies within the context of the arise-out-of employment requirement, the second concept that courts use to identify the policy limitations of coverage formulas.[79]

The objective of the arise-out-of employment requirement is to determine which risks are employment related.[80] If the risk that causes the injury is not related to employment, the injury is not compensable under the workers' compensation system.[81] Methodologically, the requirement directs the trier of fact or an appellate court to examine the character of the risk that caused the claimant's injury.[82]

The vague and essentially "noncommunicative" nature of the arise-out-of employment requirement renders it vulnerable to judicial interpretation.[83] Not surprisingly, the judiciary has developed an elaborate definitional analysis of the concept. Courts have attempted

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76. "It would seem that much of the difficulty [in interpreting the accident requirement] could be avoided by a judicial recognition that the real issue presented in these cases is one of factual causation." W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 238; *see* P. BARTH, *supra* note 2, at 105-07; 1B A. LARSON, *supra* note 2, § 38.81.

77. *See* 1B A. LARSON, *supra* note 2, § 37.20; W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 235-36, 242-44; COMPENDIUM, *supra* note 2, at 181-82.

78. *See* 1B A. LARSON, *supra* note 2, § 37.20; W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 235-36, 242-44; COMPENDIUM, *supra* note 2, at 181-82.

79. *See* 1 A. LARSON, *supra* note 2, § 6.00; Malone, *supra* note 71, at 711-19; *supra* note 71 and accompanying text.

80. *See* COMPENDIUM, *supra* note 2, at 182-83.

81. *See supra* notes 59-60 and accompanying text.

82. *See* Malone, *supra* note 71, at 711-19; *supra* note 70 and accompanying text.

The in-the-course-of employment requirement removes from consideration injuries that relate to employment through some spatial or temporal connection. *See* 1 A. LARSON, *supra* note 2, § 14.00; COMPENDIUM, *supra* note 2, at 183. The in-the-course-of employment inquiry, therefore, is not primarily or focally a causation inquiry. Its analysis, however, inexorably relates to the arise-out-of employment requirement. *See* 1A A. LARSON, *supra* note 2, §§ 29.00-.10; Malone, *supra* note 71, at 719-20, 728. Consequently, some courts have adopted a "positional risk" doctrine, which states that a work related causal connection exists when a claimant's employment requires him to be at his particular place of employment at a particular time, and, while there, he suffers an injury due to an act of God or an unprovoked assault. *See* 1 A. LARSON, *supra* note 2, § 10.00; COMPENDIUM, *supra* note 2, at 183; Malone, *supra* note 71, at 722. For a discussion of the importance of the in-the-course-of employment requirement in mental disability cases, see *infra* note 101 and accompanying text.

83. *See* Malone, *supra* note 71, at 706-11.

in this analysis to answer the arise-out-of employment inquiry by classifying the injury causing risk as a compensable employment risk, a noncompensable personal risk,[84] or a noncompensable neutral risk.[85]

2. Factual Causation

Unlike the common law of accidental injury, which recognizes a separate prima facie element for the cause-in-fact determination,[86] workers' compensation acts expressly state only legal or "policy" causation formulas.[87] Factual causation inquiries, however, implicitly underlie the policy inquiries.[88] Factual causation issues arise at two stages of the administrative trial process in workers' compensation claims. First, the trier of fact must decide the facts to establish the time, place, and other circumstances attendant to the claimant's injury. This inquiry is basic to the trial process because before the trier of fact can apply the appropriate policy formula, the claimant must present him with sufficient facts to demonstrate that the formula is applicable to the claim. Second, the trier of fact must determine whether the established facts satisfy the policy formula requirements for allowing recovery. This second step requires that a factual causal connection exist between the employee's work and the disabling injury.[89]

The determination whether the facts satisfy the coverage formula is analogous to the factual causation inquiry in common-law personal injury actions.[90] This inquiry is more difficult than the process of factfinding because the trier of fact must base its decision entirely on probabilities.[91] Moreover, the trier of fact usually cannot determine the issue whether the employment caused the disabling injury by factual probabilities that are grounded in common experience. Consequently, the administrative trier depends almost exclusively upon medical testimony at this stage of the factfinding

84. A noncompensable personal risk arises from an individual's needs, desires, habits, private life, or personal bodily or mental deficiencies. *Id.* at 720; *see* 1 A. LARSON, *supra* note 2, §§ 11.20-.23, 12.00-.35; COMPENDIUM, *supra* note 2, at 183.

85. A noncompensable neutral risk is one that is neither employment related nor characteristically related to the injured person. *See* 1 A. LARSON, *supra* note 2, §§ 10.00-.33d, 11.30-.39; COMPENDIUM, *supra* note 2, at 183; Malone, *supra* note 71, at 720.

86. *See* 2 F. HARPER & F. JAMES, *supra* note 8, § 20.2; Malone, *supra* note 2, at 60.

87. *See supra* notes 62 & 71 and accompanying text.

88. *See* 13 W. MALONE & H. JOHNSON, *supra* note 2, § 251.

89. *Id.*

90. *See supra* notes 46-57 and accompanying text.

91. *See* 13 W. MALONE & H. JOHNSON, *supra* note 2, § 251.

process.[92]

The judicial formulation of the standard of factual proof necessary to establish causation also serves to measure whether medical probabilities substantively satisfy the policy formula requirements.[93] Courts have described this standard utilizing a range of verbal formulas — most aptly a "preponderance of probabilities."[94] The "preponderance" measure has roots in the central policy of the workers' compensation system: by adopting this standard a court implicitly declares that an injury is not employment related if the employment has not factually caused the injury in a more-probable-than-not sense. Thus, an injury that does not comport to this standard is outside the policy ambit of the system.[95]

An administrative trier's factual causation determination is subject to judicial review if an erroneous application of the appropriate standard of law has occurred during the administrative trial process. A factual causation determination is conclusive and not subject to review if "substantial" evidence supports it.[96] When a factual determination has roots primarily in legal or policy considerations, a court potentially may review the determination as one that contains an erroneous question of law.[97] A court also may reverse the administrative finding on the ground that the trier of fact relied upon insub-

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92. "Though medical testimony is sometimes useful on the question of corroborating the occurrence of the accident itself . . . , its primary role relates to this question of causal connection between alleged injurious event and resulting disability." 13 W. MALONE & H. JOHNSON, *supra* note 2, § 256; *see infra* notes 94-95 and accompanying text. Although in compensation award cases concerning common physical industrial injuries, administrative law judges may not require expert testimony in proving the "causal connection between an employment event and [a] disabling mental condition . . . expert psychiatric or psychological opinion establishing the connection is virtually essential to a claimant's success." 13 W. MALONE & H. JOHNSON, *supra* note 2, § 262; *see* 3 A. LARSON, *supra* note 2, § 79.54.

93. *See* 3 A. LARSON, *supra* note 2, § 80.33; W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 278-81.

94. Jacobs v. Kaplan, 56 N.J. Super. 157, 152 A.2d 145 (1959). As Professors Malone, Plant, and Little have observed:

> The nature of the burden of proof has been described in a variety of terms. There is general agreement that it is not necessary for claimant to prove the causation to absolute certainty. But beyond that point descriptions of the degree of proof tbat is required vary in their terminology. A common expression of the standard of proof is that tbe case must be proved by the 'preponderance of the evidence' or by the 'fair weight of the evidence.' Another mode of expression is that the evidence must demonstrate a 'reasonable probability.'

W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 279 (citations omitted).

95. For an analysis of the relation among mental injuries, factual causation, and the purpose of the workers' compensation system, see *infra* notes 224-28 and accompanying text.

96. 3 A. LARSON, *supra* note 2, § 80.10; *see* 2 F. COOPER, STATE ADMINISTRATIVE LAW 722-29 (1965); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958 & Supp. 1976).

97. F. COOPER, *supra* note 96, at 665-67; *see* K. DAVIS, *supra* note 96, §§ 16.09-.10.

stantial proof.[98] Appellate courts have utilized these standards functionally either to grant judicial review and to remedy decisions that the appellate court believed were improper, or to deny judicial review and to affirm the administrative trier's legal choices.[99] This process has emerged in workers' compensation mental disability cases.[100]

C. *Judicial Approaches*

1. Physical Impact and Physical Injury Cases

The causation issues in workers' compensation mental disability cases have centered on the accidental injury and arise-out-of employment requirements. The personal injury concept also has assumed a unique technical relevance.[101] These issues have arisen in the analysis of certain fact patterns.[102] In one recognized fact pattern, a mental

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98. F. COOPER, *supra* note 96, at 734-37; *see* K. DAVIS, *supra* note 96, §§ 29.05-.06; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 605-16 (1965).

99. *See supra* notes 96-97 and accompanying text.

100. *See infra* notes 205 & 208 and accompanying text.

101. For a general discussion of the accidental injury and arise-out-of employment requirements, see *supra* notes 72-85 and accompanying text. For a discussion of the technical relevance of the personal injury concept in mental disability cases, see 1B A. LARSON, *supra* note 2, § 42.00.

The in-the-course-of employment inquiry—which requires a temporal and spatial nexus between a claimant's injury and his employment—has not been a source of contention in mental disability cases. To satisfy the arise-out-of employment requirement in a mental disability case, a claimant must prove that employment connected stimuli caused his disability. This allegation inexplicitly asserts that the mental disability was related temporally and spatially to the employment. Defendants rarely deny the spatial or temporal occurrence of an employment connected stimulus or stimuli. Instead, they focus on whether the claimant's mental injury is a personal injury, whether the stimulus or stimuli that allegedly caused the mental disorder constituted an accidental injury, or whether the mental injury arose out of the employment. The in-the-course-of employment requirement, in effect, becomes superfluous to these other technical issues. *See* Comment, *Workmen's Compensation Awards, supra* note 2, at 1144. For a discussion of the analytical relationsbip between the arise-out-of employment and in-the-course-of employment requirements, see *supra* note 75.

102. Professor Larson has categorized "mental and nervous injury" cases in his analysis of litigation on the meaning of "injury":

> The cases may be thought of, for convenience, in three groups: mental stimulus causing physical injury; physical trauma causing nervous injury; and mental stimulus causing nervous injury. It must be understood tbat this use of such words as mental, nervous, emotional, stimulus, psychic, and the like is only a rough expedient adopted in order to sort out an almost infinite variety of subtle conditions and relationships for compensation law purposes, and especially in order to narrow down the range of situations where controversy seems to persist.

1B A. LARSON, *supra* note 2, § 42.20; *see Mental and Nervous Injury, supra* note 2, at 1244-45. This categorization has attained relatively widespread critical recognition. *See, e.g.*, 13 W. MALONE & H. JOHNSON, *supra* note 2, § 235; W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 263-65; COMPENDIUM, *supra* note 2, at 199-200; Lesser & Kiev, *supra* note 2, at 245-50; Render,

disorder[103] that allegedly results from a "physical" stimulus disables a worker. The physical stimulus—which the employment environment generates and which has an impact upon the worker—either directly results in a mental disorder or causes a physical injury that brings about a mental disorder.

An issue arising from this fact pattern is whether the personal injury concept requires a disabling "physical" injury. Courts uniformly have held that a mental injury which implicates the existence of a physical impact stimulus or a physical injury satisfies the personal injury requirement.[104] The analogy to negligence cases concerning mental injuries is obvious. The existence of an objective, traumatic, work connected physical impact or injury provides an intuitive guarantee that the mental disorder is genuine and that the employment genuinely caused it.[105]

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supra note 2, at 288; Deziel v. Difco Labs., 403 Mich. 1, 22, 268 N.W.2d 1, 9 (1978); Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1016-17 (Me. 1979); Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 556, 564-65, 343 N.E.2d 913, 917-18 (1976); Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 509, 330 N.E.2d 603, 605, 369 N.Y.S.2d 637, 641 (1975).

Professor Larson's category of cases in which "mental stimulus causes physical injury" raises definitional issues that are relevant to possible solutions to the causation question in mental injury cases. For a discussion of these issues, see *infra* notes 233-35, 237, & 246 and accompanying text.

103. As Professor Larson stated, the cases concern mental disorders of "almost every conceivable kind of neurotic, psychotic, depressive, or hysterical symptom, functional overlay, or personality disorder. . . ." 1B A. LARSON, *supra* note 2, § 42.22.

104. *See, e.g.*, Employers' Ins. Co. v. Wright, 114 Ga. App. 10, 150 S.E.2d 254 (1966) (emotional trauma caused by rape at gunpoint found compensable); City of Chicago v. Industrial Comm'n, 59 Ill. 2d 284, 319 N.E.2d 749 (1974) (mental injury resulting from pulled muscle sustained while swinging sledge hammer found compensable); Ladner v. Higgins, Inc., 71 So. 2d 242 (La. App. 1954) ("post-traumatic neurosis" resulting from employee's fall from scaffold found compensable); Redfern v. Sparks-Withington Co., 353 Mich. 286, 91 N.W.2d 516 (1958) ("conversion reaction" caused when 20 pound steel weight struck employee found compensable); Hartman v. Cold Spring Granite Co., 243 Minn. 264, 67 N.W.2d 656 (1954) (neurosis without any discernable physical cause, which developed after series of work related accidents found compensable); Edmonds v. Kalfaian & Son, 9 A.D.2d 551, 189 N.Y.S.2d 456 (1959) (mental disorder that developed nine years after work related arm amputation held compensable); Dill Prods. v. Workmen's Compensation Appeal Bd., 42 Pa. Commw. 563, 401 A.2d 409 (1970) (mental and physical disability caused by work related foot injury found compensable); Greenville Finishing Co. v. Pezza, 81 R.I. 20, 98 A.2d 825 (1953) (traumatic neurosis resulting from loss of employee's eye suffered while removing cap of fire extinguisher held compensable); Imperial Knife Co. v. Calise, 80 R.I. 428, 97 A.2d 579 (1953) (employee unable to perform light work due to fear complex that developed after employee suffered severe finger fractures and lacerations from operation of power press held compensable); *see* 1B A. LARSON, *supra* note 2, § 42.22; W. SCHNEIDER, 5 WORKMEN'S COMPENSATION § 1411 (1946).

105. *See* 1B A. LARSON, *supra* note 2, §§ 42.23-.23a; *Mental and Nervous Injury*, *supra* note 2, at 1251, 1253; *supra* notes 39-45 and accompanying text.

2. Mental Stress Cases

A more troublesome fact pattern concerns claimants who suffer mental disabilities that allegedly result from nonphysical work connected stimuli. Like the physical impact or injury situation, this fact pattern also raises the issue whether the personal injury concept requires a physical injury. When a physical impact stimulus causes a mental disorder, a court can perceive the injury as physical because it possesses a physical dimension. When an injury does not include a physical element, however, the policy issues underlying recovery for mental disorders—the genuineness of the injury and the genuineness of the causal relation between the employment and the disorder[106]—become more apparent.

Although a minority of courts have denied recovery in these cases the distinct majority grant compensation at the threshold in mental disability cases that concern nonphysical—or "mental" —work connected stimuli.[107] The technical justification for the minority view has been that the "personal injury by accident" concept mandates that disabling mental injuries have a physical dimension to them.[108] The majority of courts, on the other hand, have interpreted

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106. *See supra* notes 4, 45, 47, 51, & 57 and accompanying text.

107. *See* 1B A. LARSON, *supra* note 2, §§ 42.23-.23(b).

108. Perhaps the leading case supporting the minority view is Jacobs v. Goodyear Tire & Rubber Co., 196 Kan. 613, 412 P.2d 986 (1966), in which the court concluded that claimant did not sustain a "personal injury by accident" when the mental disorder resulted from the conflicting demands of management and union coemployees. For a further discussion of the case, see Note, *Workmen's Compensation—The Compensability of Injuries From Psychic Trauma—Who's Afraid of Wolfe?*, 25 U. KAN. L. REV. 158, 168 (1976). In Sawyer v. Pacific Indem. Co., 141 Ga. App. 298, 233 S.E.2d 227 (1977), the court found that claimant, who became "acutely psychotic" after working with emotionally disturbed youngsters for two years, had not suffered a compensable personal injury under the workmen's compensation statute. The court noted, however, that it properly could consider the claim under Georgia's occupational disease statute. *Id.* at 302, 233 S.E.2d at 231. For further discussion of this alternate statutory remedy, see *infra* note 214 and accompanying text. In Vernon v. Seven-Eleven Stores, 547 P.2d 1300 (Okla. 1976), the court, citing *Jacobs*, held that a mental injury induced by claimant's submission to a polygraph test was not a compensable personal injury. *See* Erhart v. Great W. Sugar Co., 169 Mont. 375, 546 P.2d 1055 (1976) (claimant's mental and physical breakdown, which resulted from animosity directed at him for installing electrical system that would replace many employees' jobs held not compensable personal injury); Daugherty v. ITT Continental Baking Co., 558 P.2d 393 (Okla. 1976) (claimant who sustained mental injury after surprise inspection and severe criticism by supervisors did not suffer a compensable personal injury).

Other courts have relied on statutory language that requires "harm to the physical structure of the body" to deny compensation for mental injuries. *See, e.g.*, City Ice & Fuel Div. v. Smith, 56 So. 2d 329 (Fla. 1952) (claimant who received no physical injury but experienced fright in traffic accident and developed mental disability denied compensation under statute defining "injury" to exclude "a mental or nervous injury due to fright or excitement only"); Bekelski v. O.F. Neal Co., 141 Neb. 657, 4 N.W.2d 741 (1942) (claimant elevator operator who

the "personal injury by accident" requirement differently. One line of decisions has not imposed threshold limitations on recovery for mental injury when the fact pattern concerns a sudden, traumatic mental impact—usually the fright or shock that a worker experiences in an isolated, work related event. Courts have justified these decisions technically by emphasizing the *accidental* injury concept rather than the personal injury concept. The occurrence of an unexpected and temporally definite mental impact has allowed courts easily to characterize the injury as accidental.[109] Policy justifications have re-

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suffered mental disability after being trapped with man who had been crushed by the elevator, did not suffer statutorily defined "personal injury"). *But see* Lyng v. Rao, 72 So. 2d 53 (Fla. 1954) (claimant who was working with feet on wet floor when lightning struck, which resulted in mental injury, suffered compensable injury). The Louisiana courts never have found that a purely mental incident produces a compensable injury. For a comprehensive analysis of Louisiana's treatment of mental trauma resulting in disabling mental injury, see 13 W. MALONE & H. JOHNSON, *supra* note 2, §§ 217, 235.

109. *See, e.g.,* Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 556, 563, 343 N.E.2d 913, 917 (1976) (claimant aided employee whose hand was severed in punch press; "sudden severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm [is] an accident within the meaning of the [Workmen's Compensation] Act, though no physical trauma originally was sustained"); Fitzgibbons' Case, 373 N.E.2d 1174, 1177 (Mass. 1978) (claimant suffered acute anxiety reaction and later committed suicide after employee died while carrying out his orders; a compensable "personal injury" includes "cases involving mental disorders or disabilities causally connected to mental trauma or shock," but holding limited to cases in which single traumatic event occurred); Simon v. R.H.H. Steel Laundry, 25 N.J. Super. 50, 95 A.2d 446, *aff'd,* 26 N.J. Super. 598, 98 A.2d 604 (1953) (violent steampipe explosion held compensable accident); Peters v. New York State Agricultural & Indus. School, 64 A.D. 2d 749, 406 N.Y.S.2d 638 (1978) (violent disruption in training home for delinquent boys in which claimant-supervisor received threats but no physical injury held compensable accident); Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975) (claimant discovered supervisor's body after he committed suicide; neither foreseeability nor physical impact necessary; held compensable accident); Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941) (claimant frightened by electrical flash of short circuit held compensable accident). For further discussion of *Wolfe,* see 1B A. LARSON, *supra* note 2, § 42.23(a); Note, *supra* note 108; Comment, *Workmen's Compensation—Compensability of Mental Injury,* 21 N.Y.L.F. 465 (1976). For further discussion of *Pathfinder,* see 1B A. LARSON, *supra* note 2, § 42.23(a); Comment, *Recovery for Nervous Injury, supra* note 2.

Courts have awarded compensation in mental impact mental disability cases even when the statutory definitions of "injury" seem preclusive. Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955), is among the most noteworthy decisions in light of the Texas statute's restrictive definition of "injury" as "damage or harm to the physical structure of the body." The Texas court circumvented the statute's narrow definition by viewing a body's "physical structure" as an entire, interrelated organism, which included mental aspects, not just bones and tissues. For a further discussion of the case, see 1B A. LARSON, *supra* note 2, § 42.23(a). A recent line of Texas cases has refused to apply the *Bailey* reasoning to mental stress cases in which a mental impact has not occurred. *See, e.g.,* Transportation Ins. Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979) (mental disability caused by 42 years of stressful work not compensable); University of Tex. Sys. v. Schieffer, 588 S.W.2d 602 (Tex. Civ. App. 1979) (mental disability caused by stressful working relationship with supervisor held not compensable); Jackson v. Liberty Mut. Ins. Co., 580 S.W.2d 70 (Tex. Civ. App. 1979) (truckdriver who normally drove

inforced the accidental injury emphasis. First, medical science has discredited the judicial belief that the presence of "some shred of the 'physical' " assured the genuineness of the injury and the causal relation.[110] Therefore, a rule that "allows an award for a claimant . . . who is suffering from psychological disabilities caused by an often minor physical injury but denies an award to a claimant with a similar psychological disability brought about . . . by a sudden, severe emotional shock and who fortuitously did not sustain any physical injury in his accident" furthers illogical and invalid policy.[111] Second, courts have found a mental impact stimulus resulting from a sudden, specific, employment related mental event sufficiently reliable to assuage a court's policy apprehensions.[112]

Another, more controversial, line of cases has addressed a fact pattern in which the mental stimuli that allegedly cause a mental disability result from gradual employment pressures.[113] Courts confronting the technical and policy problems in these cases have taken various approaches. For example, in *Jose v. Equifax, Inc.*,[114] in which claimant allegedly suffered a mental disability as a result of "a tremendous amount of pressures and tension" from his employment ob-

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large trucks 10-12 hours a day, five days a week, suffered a heart attack while doing paperwork; held not compensable). For further discussion of the Texas approaches to mental disabilities, see Comment, *The Compensability of Mentally Induced Occupational Diseases under Texas Workers' Compensation Law, supra* note 2.

Other states have relied on the *Bailey* reformulation of the statutory phrase "physical structure of the body" to reject the dichotomy between mind and body and to allow recovery. *See, e.g.*, Todd v. Goostree, 493 S.W.2d 411 (Mo. App. 1973) (mental disability caused by emotional shock compensable under statute defining "injury" as "violence to the physical structure of the body").

110. *See, e.g.*, Patbfinder Co. v. Industrial Comm'n, 62 Ill. 2d 556, 561, 343 N.E.2d 913, 918 (1976); *Mental and Nervous Injury, supra* note 2, at 1260.

111. 62 Ill. 2d at 64-65, 343 N.E.2d at 917; *see also* Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 510, 330 N.E.2d 603, 606, 369 N.Y.S.2d 637, 642 (1975) ("There is notbing talismanic about physical impact.").

112. *See* Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1018 (Me. 1979).

113. *See* 1B A. LARSON, *supra* note 2, § 42.23(b). These cases create more apprehension about fraudulent claims and the genuineness of the causal relation between employment and the mental injury than do cases in which the plaintiff alleges that the causal stimulus is a traumatic mental impact. To some extent courts can measure objectively shock or fright when these conditions result from temporally and spatially definite employment events. Nonimpact mental stresses—the gradual stresses of employment—are no more subjective than mental stress that results from an identifiable traumatic event. A discernible objective event, however, a "badge of reliability," is not present when the alleged causal mental stimuli are gradual. Their subjective nature, therefore, is less visibly susceptible to objective measurement. Triers fear fraud and malingering even though the actual injury may be identical to the injury that results from a definite event. *See supra* note 37 and accompanying text.

114. 556 S.W.2d 82 (Tenn. 1977).

ligations,[115] the Tennessee Supreme Court affirmed an administrative denial of compensation. The court held that although courts had construed the accidental injury requirement to encompass the unexpected causal effect of an alleged work related stimulus, the requirement "still does not embrace every stress or strain of daily living or every undesirable experience encountered [in] employment."[116] The court also implied that without this threshold limitation, claimants would use the workers' compensation system to seek compensation for personal nonwork related mental disorders. As a result, the system would become a "general, comprehensive health and accident insurance" system.[117]

The Supreme Judicial Court of Massachusetts in *Albanese's Case*[118] adopted a different threshold for potential recovery in gradual stress mental disability cases. Albanese worked as a foreman for a steel company where his duties included the supervision of certain employee activities. When the plant's employees voted to unionize, considerable friction developed between Albanese and the workers. Albanese's job required him continually to relay information to the workers that would enrage them—for example, the owner's decision to eliminate overtime and the order that the men must do more work. After Albanese had heated discussions with the workers, however, the owner rescinded his unpopular decisions. After one tumultuous exchange, Albanese became distressed, developed chest pains, sweatiness, shortness of breath, headaches, and depression. Doctors diagnosed his disabling condition as "a chronic anxiety state mixed with depression and somatized reaction and . . . neurocirculatory asthenia."[119]

The court perceived that the issue in *Albanese* was whether claimant suffered a personal injury under the Massachusetts Act.[120] The court reversed the appeals board decision, which had denied recovery as a threshold matter of law. The board apparently had based its decision on an earlier state supreme court opinion, *Begin's Case*.[121] The holding in *Begin's Case* was limited, however; in that case, the emotional disturbance that an employee sustained as a result of stressful employment over a three and one-half year period

115. *Id.* at 83.
116. *Id.* at 84.
117. *Id.*
118. 389 N.E.2d 83 (Mass. 1979).
119. *Id.* at 85.
120. *Id.* at 84.
121. *Id.* at 86 n.3.

was not a personal injury under the Massachusetts Act.[122] In *Albanese*, on the other hand, the court stated that the board's findings revealed that claimant's injury resulted from "a series of identifiable stressful work related incidents occurring over a relatively brief period of time" — not from ordinary general employment stresses.[123] These factual findings brought claimant within the standard adopted in *Fitzgibbon's Case*,[124] which the court had decided after the board's decision. In *Fitzgibbon's Case* the court declared that mental disabilities caused by mentally traumatic events arising out of employment were technically within the personal injury requirement.[125] *Fitzgibbon's Case* further described a mentally traumatic event as "stress greater than the ordinary stresses of everyday work."[126] The "greater than ordinary" stresses that Albanese suffered, therefore, were sufficient to satisfy the personal injury requirement.[127]

The Supreme Court of Wisconsin directly confronted the threshold policy limitations in gradual stress mental disability cases in *School District No. 1 v. Department of Industry, Labor & Human Relations*.[128] Claimant in *School District No. 1* was a high school guidance counselor. The school's student council placed a list of recommendations in her school mailbox, requesting the removal of several staff members and other changes. The counselor's copy of this list was difficult to read, and she did not learn until the following day, after questioning students, that the list recommended her removal from the staff. The counselor became emotionally upset about this recommendation; she was unable to sleep or eat and suffered nausea, severe headaches, and acute anxiety. The counselor alleged that the incident with students had caused her condition, which doctors diagnosed as a " 'severe tension state with gastrointestinal signs and symptoms.' "[129]

The court began its analysis by declaring that the Wisconsin Workers' Compensation Act clearly did not intend to limit recovery

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122. 354 Mass. 594, 596, 238 N.E.2d 864, 866 (1968).

123. *Albanese's Case*, 389 N.E.2d at 86.

124. *Id.*

125. 373 N.E.2d 1174, 1177 (Mass. 1978); *see supra* note 109 and accompanying text.

126. 373 N.E.2d at 1177 (Mass. 1978); *see supra* note 109 and accompanying text.

127. *Albanese's Case*, 389 N.E.2d at 86. The court did not elaborate on the policy dimensions of its decision. For an excellent discussion of compensation for mental disability in Massachusetts, see Note, *When Stress Becomes Distress: Mental Disabilities Under Workers' Compensation in Massachusetts*, *supra* note 2.

128. 62 Wis. 2d 370, 215 N.W.2d 373 (1974).

129. *Id.* at 371, 215 N.W.2d at 374.

to physical injuries and traumatically caused mental injuries.[130] The analysis then shifted to the Act's accidental injury requirement. The court recognized that the claim would satisfy the accident requirement if the employee did not expect the cause or effect of the injury.[131] The court emphasized, however, that it had not defined the requirement to encompass "every occurrence or event which befalls the employee."[132] Like the Tennessee court in *Jose,*[133] the Wisconsin court feared that without any definitional limit to the accidental injury requirement, the workers' compensation system might become a social insurance system. The danger of malingering and the difficulty of proving a causal relation between the employment and the mental disorder in mental injury cases intensified this fear.[134] Referring to the limiting elements in tort actions for mental injuries intentionally, recklessly, or negligently caused,[135] the court concluded that "some effective means of evaluating [a] claim of mental injury" in workers' compensation cases was necessary.[136] Accordingly, the court adopted a standard under which mental injuries that did not result from trauma must arise from "a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience."[137] Applying this test, the court denied claimant compensation on the ground that her experience "could not be deemed" different from "the countless emotional strains and differences that employees encounter daily without serious mental injury."[138]

The Supreme Court of Arizona established a similar standard in

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130. "It is clear that the legislature intended to impose liability against the employer for *mental* and physical injuries which are caused by accident or disease." The court relied on § 102.01 of the Wisconsin Workmen's Compensation Act, which defines " 'injury' " as " 'mental or physical harm to an employee caused by *accident*. . . .' " 62 Wis. 2d at 373, 215 N.W.2d at 375-76 (court's emphasis). The court added: "Similarly, it is clear that the legislature did not intend to limit the employer's liability for mental injuries solely to those which are traumatically caused. There is no statutory language limiting liability for mental injury in such a manner and none may be inferred." *Id.* at 373-74, 215 N.W.2d at 375 (footnotes omitted).

131. *Id.* at 374, 215 N.W.2d at 376.

132. *Id.*

133. *See supra* notes 114-17 and accompanying text.

134. *Id.* at 376, 215 N.W.2d at 376-77.

135. *Id.* at 376-77, 215 N.W.2d at 377. For a general discussion of the principles to which the Wisconsin court referred, see *supra* notes 39-57 and accompanying text.

136. School Dist. No. 1 v. Department of Indus., Labor & Human Relations, 62 Wis. 2d at 377, 215 N.W.2d at 377.

137. *Id.*

138. *Id.* The Wisconsin court expressly affirmed and applied the *School Dist. No. 1* threshold standard in Swiss Colony v. Department of Indus., Labor & Human Relations, 72 Wis. 2d 46, 240 N.W.2d 128 (1976). *Swiss Colony* also raised the issue of the appropriate causation standard in mental disability cases. *See infra* note 165 and accompanying text.

Fireman's Fund Insurance Co. v. Industrial Commission[139] and *Sloss v. Industrial Commission.*[140] In *Fireman's Fund* claimant's mental disability allegedly resulted from constant, psychologically intolerable work responsibility. Focusing on the accident requirement, the court held that the disability had unexpectedly affected her.[141] In *Sloss* the court elaborated on the *Fireman's Fund* standard. Claimant in *Sloss* was a highway patrolman who suffered from a condition that doctors diagnosed as "chronic anxiety."[142] Claimant alleged that his condition developed from the pressures of his work. The administrative law judge, without the benefit of *Fireman's Fund,* had denied recovery because the "stresses to which [claimant] was exposed in his employment were [the] same as, and no greater than, those imposed upon all other highway patrolmen in [the] same type of duty."[143] The Arizona Supreme Court approved this decision, adding that under *Firemen's Fund* the accident concept necessitated a showing of more than ordinary and usual work related stress.[144]

The Supreme Judicial Court of Maine in *Townsend v. Maine Bureau of Public Safety*[145] expressly adopted the Wisconsin ap-

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139. 119 Ariz. 51, 579 P.2d 555 (1978).

140. 121 Ariz. 10, 588 P.2d 303 (1979) (reh. denied).

141. Claimant in *Fireman's Fund* was an underwriter for defendant's insurance agency. Within a short time of her arrival, the agency experienced a period of explosive growth. Claimant, "a conscientious employee and a perfectionist," undertook duties that placed her "under constant pressure." *Id.* In April 1975 defendant agency purchased another agency and added another employee. The agency made claimant the supervisor of the new employee and gave her responsibility for merging the books of the two agencies. Claimant began to feel "frustrated and ineffective" and "experienced difficulty relating to her co-workers . . . ." *Id.* at 52-53, 579 P.2d at 556-57. After a severe emotional outbreak, she was hospitalized for "neurotic depression, or a mental breakdown." *Id.* at 53, 579 P.2d at 557.

Claimant alleged that she suffered a "disabling mental condition brought on by the gradual buildup of the stress and strain of her employment." *Id.* The agency argued that the injury was not compensable because "there must be an unexpected injury-causing event accompanied by a physical impact or exertion" to satisfy the Arizona Act's accident requirement. The Arizona Supreme Court rejected defendant's argument and affirmed the decision of the Arizona Court of Appeals in Brock v. Indus. Comm'n, 15 Ariz. App. 95, 486 P.2d 207 (1971). The court of appeals in *Brock* had held that "purely excessive emotions, *unaccompanied by physical force or exertion*" could form the basis of a compensable accident under the Arizona Act. *Id.* at 96, 486 P.2d at 208 (emphasis in original). Similarly, the *Fireman's Fund* court found that claimant's disability—"the result of the delegation to her of excessive responsibilities [which] resulted in the unexpected, her mental breakdown . . . "—was "sufficiently unanticipated to be called 'unexpected' and hence, accidental . . . ." Fireman's Fund Ins. Co. v. Industrial Comm'n, 119 Ariz. 51, 53, 579 P.2d 555, 557 (1978).

142. 121 Ariz. 10, 10, 588 P.2d 303, 304 (1979) (reh. denied).

143. *Id.*, 588 P.2d at 303-04.

144. *Id.* at 11, 558 P.2d at 304.

145. 404 A.2d 1014, 1019 (Me. 1979).

proach in *School District No. 1.*[146] Unlike the Wisconsin and Arizona courts, however, the Maine court did not base its decision on the accident requirement. Instead, the court expressly stated the policy reason for its adoption of the limiting threshold standard: "a higher threshold level than simply the usual and ordinary pressures that exist in any working situation would erect an appropriate buffer between the employer and a host of malingering claims."[147]

The Maine court's analysis reveals the underlying methodology of the Wisconsin and Arizona approaches: to counterbalance the policy problems that emanate from the subjective nature of mental injuries by providing a method of objective measurement. The Oregon Court of Appeals in *James v. State Accident Insurance Fund* recognized this methodological attempt in its accurate restatement of the Wisconsin and Arizona approaches: a claimant who suffers a mental disability cannot receive compensation as a threshold matter of law if the alleged causal stimuli do not result from an employment environment "unusual or excessive to the point that the average worker would experience an adverse emotional reaction."[148]

3. Rejection of Threshold Limitations

A distinct minority of jurisdictions do not impose any threshold limitations in mental disability cases,[149] and instead view mental dis-

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146. 62 Wis. 2d 370, 215 N.W.2d 373 (1974); *see supra* notes 158-67 and accompanying text.

147. 404 A.2d at 1019. In addition, the court reiterated the Wisconsin Supreme Court's argument in *School Dist. No. 1* that "[this standard] would also serve to filter out a sufficient number of cases so that an employer would not be thrust into the role of a general insurer. . . ." *Id. See supra* note 134 and accompanying text. For a discussion of the relevance of this policy argument in mental disability cases, see *infra* note 221 and accompanying text.

148. James v. State Accident Ins. Fund, 44 Or. App. 405, 410, 605 P.2d 1368, 1370 (1980). The Oregon court, however, did not adopt this threshold standard. *Id.* at 411, 605 P.2d at 1371. *See infra* note 149 and accompanying text. Professor Larson has endorsed the Wisconsin-Arizona-Maine threshold approach. *See* 1B A. LARSON, *supra* note 2, § 43.23(b).

149. *See, e.g.*, Baker v. Workmen's Compensation Appeals Bd., 18 Cal. App. 3d 852, 96 Cal. Rptr. 279 (1971); Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeals Bd., 53 Hawaii 32, 487 P.2d 278 (1971); Yocum v. Pierce, 534 S.W.2d 796 (Ky. 1976); Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014 (Me. 1979); Carter v. General Motors, 361 Mich. 577, 106 N.W.2d 105 (1960); University of Pittsburgh v. Workmen's Compensation Appeal Bd., 49 Pa. Commw. 347, 405 A.2d 1048 (1979).

In James v. State Accident Ins. Fund, 44 Or. App. 405, 605 P.2d 1368 (1980), the Oregon Court of Appeals held that claimants who suffer mental injury from ordinary, gradual mental stress are compensable under the occupational disease provision of the Oregon Act. The court, however, emphasized that the technical distinction between an accidental injury and occupational disease has little import in Oregon. *Id.* at 409, 605 P.2d at 1370. Instead, the central technical issue—regardless whether the claimant views his mental disability as an accidental injury or occupational disease—is "whether claimant has proven the causal nexus between the

abilities as analytically identical to physical disabilities.[150] The first court that adopted this approach was the Supreme Court of Michigan in *Carter v. General Motors*.[151] Claimant in *Carter* worked on a hub assembly job at defendant's automobile manufacturing plant. Claimant's work required him to take an assembled hub from a table to his workbench, "remove burrs with a file, . . . grind out holes in the assembly with a drill, and place the assembly on a conveyor belt."[152] Claimant could not "keep up with the pace of the job unless he took two assemblies at a time to his workbench."[153] His foreman, however, repeatedly instructed him against this because the assembly parts became mixed on the conveyor belt. Although claimant attempted to keep up with the job for fear of layoff if he failed, he continued to fall behind the pace and to mix up the assembly parts. Consequently, his foreman continued to berate him. As a result of

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disease and the work place." *Id.* The Georgia Court of Appeals also has allowed recovery for mental disabilities caused by ordinary, gradual mental stress under its general coverage occupational disease statute. *See* Sawyer v. Pacific Indem. Co., 141 Ga. App. 298, 233 S.E.2d 227 (1977); *supra* note 108 and accompanying text. For a discussion of the analytical effect that the Oregon and Georgia approaches have on mental disability cases, see *infra* note 214 and accompanying text.

150. In Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014 (Me. 1979), the Maine Supreme Judicial Court added the alternative requirement that "ordinary work-related stress and strain could be compensable *if it [is] shown by clear and convincing evidence* that the trauma generated by the employment *predominated* in producing the resulting injury." *Id.* at 1019-20 (emphasis added). For a discussion of the analytical effect of this standard of proof on mental disability cases, see *infra* note 205 and accompanying text. The Maine court, accordingly, has adopted a tiered approach to mental disability cases:

> [W]here there is a sudden mental injury precipitated by a work-related event, our typical workers' compensation rules will govern. . . . Where, however, the mental disability is the gradual result of work-related stresses, the claimant will have to demonstrate either that he was subjected to greater pressures and tensions than those experienced by the average employee or, alternatively, by clear and convincing evidence show that the ordinary and usual work-related pressures predominated in producing the injury.

Id. For additional discussion of the Maine approach, see *supra* notes 145-47 and accompanying text.

151. 361 Mich. 577, 106 N.W.2d 105 (1960). The *Carter* opinion has received extensive critical attention. *See* 1B A. LARSON, *supra* note 2, § 42.23(b); 13 W. MALONE & H. JOHNSON, *supra* note 2, § 235; Brill, *supra* note 2, at 312-15; Downing, *Workmen's Compensation*, 8 WAYNE L. REV. 272, 277 (1962); Joseph, *supra* note 2, at 1103-07, 1124-30; Lesser & Kiev, *supra* note 2, at 249; Loria, *supra* note 2, at 901; Manson, *supra* note 2, at 384; *Mental and Nervous Injury*, *supra* note 2, at 1252; Render, *supra* note 2, at 297; Robitscher, *supra* note 2, at 195-96, 250-53; Sadoff, *Civil Law and Psychiatry: New Dimensions*, 56 A.B.A. J. 165, 168 (1970); Selzer, *supra* note 2, at 955-56; Spenser, *supra* note 2, at 714-17; Note, *Workman's Compensation—Psychosis Resulting From Daily Assembly Line Pressures*, 21 LA. L. REV. 868 (1961); Case Comment, *Workmen's Compensation—Disabling Psychosis Caused by Emotional Pressures of Assembly Line Held a Compensable Injury Under State Workmen's Compensation Act*, 109 U. PA. L. REV. 1185 (1961).

152. 361 Mich. 577, 580, 106 N.W.2d 105, 107 (1960).

153. *Id.* at 580, 106 N.W.2d at 107.

the employment dilemma, claimant suffered an emotional collapse diagnosed as paranoid schizophrenia and a residual type schizophrenic reaction.[154]

The issue that the court expressed in *Carter* was whether a mental disability is compensable when the injury allegedly is caused by "emotional pressures not . . . unusual . . . in any respect,—that is, not shown . . . to be any different from the emotional pressures encountered by . . . fellow workers in similar employment."[155] The court concluded that Michigan law did not compel limiting recovery in a mental injury case to fact situations in which the claimant suffered a single physical injury or a single mental shock.[156] The court added that injuries sustained by gradual, accidental, mental stimuli satisfy the accidental injury requirement and, therefore, were compensable.[157] The court then granted claimant recovery because the factual record revealed that his disability arose out of the pressures of his work.[158]

The *Carter* court articulated as the policy rationale for its conclusions that the basic purpose of the workers' compensation system compelled that a worker disabled as a result of a work related mental injury receive identical treatment to a worker disabled by a work related physical injury.[159] All courts that have adopted the *Carter* approach have advocated the same rationale either implicitly or expressly.[160]

4. The Arise-Out-Of Employment Inquiry

The determination whether a mental injury has arisen out of and in the course of a claimant's employment is central to mental disabil-

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154. *Id.* at 581, 106 N.W.2d at 107.

155. *Id.* at 585, 106 N.W.2d at 109.

156. *Id.* at 593, 106 N.W.2d at 113. The Michigan Supreme Court had been one of the first courts to refuse to limit recovery in a mental disability case in which a mental impact allegedly caused the mental injury. *See* Klein v. Len H. Darling Co., 217 Mich. 485, 187 N.W. 400 (1922) (mental disability that resulted in claimant's death caused by shock claimant experienced when he dropped register from second floor and hit an employee who was rendered unconscious).

157. 361 Mich. 577, 592-93, 106 N.W.2d 105, 113 (1960).

158. *Id.* at 593, 106 N.W.2d at 113.

159. *Id.* at 580, 106 N.W.2d at 106.

160. *See, e.g.,* Baker v. Workmen's Compensation Appeals Bd., 18 Cal. App. 3d 852, 861-62, 96 Cal. Rptr. 279, 286 (1971) ("[A] disabling [physical] injury may be the result of the cumulative effect of each day's stresses and strains. We perceive no logical basis for a different requirement for a psychoneurotic injury. To one experiencing it, such an injury is as real and as disabling as a physical injury." (citations omitted)); Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeals Bd., 53 Hawaii 32, 38, 387 P.2d 278, 282 (1971).

ity cases.[161] Whereas the in-the-course-of employment inquiry as a practical matter is relatively unimportant,[162] courts focus upon the technical and policy problems of the arise-out-of employment inquiry.

Courts generally have recognized—consistent with present medical knowledge—that an individual's personal psychological disposition in part causes employment related mental injuries. Accordingly, courts have interpreted the arise-out-of employment requirement to account for this element of personal susceptibility.[163] This interpretation arises from the axiom in workers' compensation law that employers must take employees as they are—with their personal bodily and mental deficiencies.[164] Therefore, the appropriate arise-out-of employment inquiry in mental disability cases is whether the workers' employment aggravates, accelerates, or combines with his personal mental disposition to produce his disability.[165] The claimant

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161. *See* 1 A. LARSON, *supra* note 2, § 12.20; 1B A. LARSON, *supra* note 2, § 42.23(c); *supra* notes 73 & 80-85 and accompanying text.

162. *See supra* note 101 and accompanying text.

163. *See supra* note 84 and accompanying text; *infra* note 165 and accompanying text.

164. *See* 1 A. LARSON, *supra* note 2, § 12.20.

165. *See id.*; 1B A. LARSON, *supra* note 2, §§ 42.22-.23(c).

When risks personal to an employee arguably contribute to an alleged work related injury, the axiom that employers must "take employees as they are" directly affects the risk analyses that courts utilize to interpret the arise-out-of employment requirement. The employment risk necessary to bring the injury within the ambit of the workers' compensation system effectively is found when the employment contributes to the injury in a more-probable-than-not factual sense.

Dr. Smith has argued perceptively that in psychic injury cases the nature of the medicolegal problem compels both parties to argue for a causation standard that takes into account the plaintiff's preexisting disposition toward mental disturbance. Counsel for a plaintiff must realize that:

> Plaintiff must capitalize on the legal doctrine that "the wrongdoer takes his victim as he finds him" and cannot have a mitigation of damages hecause he is more vulnerable as the result of preexisting disease, disability, or impairment. . . . He should realize that it will be disastrous if he claims primary causation and the defendant proceeds to prove that the plaintiff had a preexisting disease or impairment. In such cases, it is much hetter for the plaintiff to bring out the prior impairments of health and to he content with a theory of aggravation. This conforms to scientific reality and may still eventuate in a substantial award.

Smith, *Problems of Proof*, *supra* note 8, at 597, 622 (footnotes omitted). A defendant's counsel must respond to the plaintiff's approach by arguing:

> [A]ny particular set of signs and symptoms . . . may be due to various alternative causes not associated with the accident sought to be incriminated. They may he due to a number of organic, functional or psychological diseases having no relationship to trauma or they may be consequences of prior accidents and impairments in no way caused by defendant.

Id. at 599 (footnotes omitted).

The Wisconsin Supreme Court apparently adopted a different causation standard for

must meet this standard, which courts consider a *factual* determination,[166] by a "preponderance of probabilities."[167] Thus, a claimant may obtain judicial review of an administrative decision only if the administrative factfinder has applied the standard erroneously or has based the decision on insubstantial evidence.[168]

Courts frequently have utilized the arise-out-of employment inquiry to deny compensation in cases in which claimants have satisfied judicially imposed threshold limitations.[169] The principles of appellate review underlie these denials. In opinions reversing administrative findings that allowed compensation, courts have applied an "aggravate, accelerate, or combine with" standard and have found the weight of the evidence insubstantial because the claimant's

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mental disabilities in Swiss Colony, Inc. v. Department of Indus., Labor & Human Relations, 72 Wis. 2d 46, 240 N.W.2d 128 (1976). In an earlier opinion, Lewellyn v. Department of Indus., Labor & Human Relations, 38 Wis. 2d 43, 155 N.W.2d 678 (1968), tbe court had adopted the principle that when "a definitely preexisting condition of a progressively deteriorating nature" exists, an injury is compensable if the employment "precipitates, aggravates and acccelerates [the condition] beyond normal progression." *Id.* at 59, 155 N.W.2d at 687. In *Swiss Colony* the court found no indication that claimant—who suffered a disability diagnosed as psycbotic schizophrenia—"had previously suffered any kind of mental disease or debility" and determined, therefore, that the *Lewellyn* aggravation requirement did not apply to the facts of the case. 72 Wis. 2d at 54, 240 N.W.2d at 132. The court then upheld the administrative factual finding that the "stresses and strains of [claimant's] employment *caused* her severe mental disability." *Id.* at 56, 240 N.W.2d at 133 (emphasis added). This statement clearly implies that the existence of a factual causal relation between the claimant's mental injury and her employment is necessary in mental disability cases. The practical difference between tbis causation requirement and the requirement that employment must aggravate or accelerate a mental disability is difficult to discern.

166. Professor Larson has concluded:

> [I]n practice most of the problems in this area are medical rather than legal. . . . [D]enials of compensation in this category are almost entirely the result of holdings that the evidence did not support a finding that the employment contributed to the final result. Whether the employment aggravated, accelerated, or combined with the internal weakness or disease to produce the disability is a question of fact, not law, and a finding of fact on this point by the commission based on any medical testimony . . . will not be disturbed on appeal.

1 A. LARSON, *supra* note 2, § 12.20 (footnotes omitted). *See also* 1B A. LARSON, *supra* note 2, § 42.23(c).

167. *See supra* notes 93-95 and accompanying text. The Maine Supreme Judicial Court has imposed a stricter standard of proof in gradual, ordinary mental stress mental disability cases. *See supra* note 150 and accompany text. The Louisiana Court of Appeals, which bas limited recovery in mental disability cases to physical impact fact patterns, also has suggested a stricter standard. *See* Victoriana v. Orleans Parish Bd., 346 So. 2d 271 (La. 1977) (plaintiff must prove mental injury as any other injury; factfinder must proceed with utmost caution and exercise extreme care). For a discussion of the policy effect of stricter proof standards in mental disability cases, see *infra* note 205 and accompanying text.

168. *See* 1 A. LARSON, *supra* note 2, § 12.20; *supra* notes 94-99 and accompanying text.

169. *See* 1B A. LARSON, *supra* note 2, § 42.22 n.79.10; *supra* note 164 and accompanying text.

subjective predisposition to the injury—not his employment—caused the injury in a more-probable-than not or "substantial" sense.[170]

Courts also have utilized this procedural technique in jurisdictions that do not impose threshold limitations in mental disability cases. The Michigan Supreme Court, which was the first court to reject threshold limitations,[171] decided the most dramatic set of cases exemplifying the use of the aggravate, accelerate, or combine with concept with interpretation of the arise-out-of employment standard in the appellate review process. In 1975, and again in 1978, after remand, the court decided *Deziel v. Difco Laboratories, Inc., Bahu v. Chrysler Corp.,* and *MacKenzie v. Fisher Body Division.* The court consolidated the three cases into one opinion, *Deziel v. Difco Laboratories, Inc.*[172]

Claimant in *Deziel* handled chemical test tubes in defendant's laboratory. She dropped a test tube, which caused glass to fly into her eye; several months later she dropped another test tube filled with iodine, which splattered around her eyes. After the second accident, claimant became disabled by pain in the back of her eyes, anxiety, headaches, tiredness, and nausea—allegedly as a result of the two work incidents.[173] Claimant in *Bahu* worked at a stamping machine in defendant's plant, a job that required him to lift and move fifteen hundred seven pound parts a day from an overhead conveyor. He claimed that his job caused various strains, traumas, and pressures which resulted in a functional disability to his neck, back, and shoulder.[174] In *MacKenzie* claimant suffered from a disabling psychoneurotic condition that he alleged resulted from his employment. Claimant worked the day shift at defendant's plant; his job was to count and ship back defective parts to vendors. During the last two

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170. *See, e.g.,* Ramonett v. Indus. Comm'n, 27 Ariz. App. 728, 558 P.2d 923 (1976) (reh. denied) (review denied); Rund v. Cessna Aircraft Co., 213 Kan. 812, 518 P.2d 518 (1974) (reh. denied); State Highway Dept. v. Hopwood, 331 S.W.2d 900 (Ky. 1970); Gibson v. New Orleans Pub. School Bd., 352 So. 2d 732 (La. App. 1977); Greene v. Yeager, 222 Md. 411, 160 A.2d 605 (1960); Zobitz v. City of Ely, 219 Minn. 411, 18 N.W.2d 126 (1945); Smith v. Cascade Laundry Co., 335 S.W.2d 501 (Mo. Ct. App. 1960); Condiles v. Waumbec Mills, 95 N.H. 127, 58 A.2d 726 (1948); Krasinski v. American Brass Co., 12 A.D.2d 827, 209 N.Y.S.2d 335 (1961); Ada Coca-Cola Bottling Co. v. Snead, 364 P.2d 696 (Okla. 1961) (reh. denied); Quillen v. O.D. Purington Co., 80 R.I. 165, 94 A.2d 247 (1953); Berndt v. Department of Labor & Indus., 44 Wash. 2d 138, 265 P.2d 1037 (1954); Miller Rasmussen Ice & Coal Co. v. Indus. Comm'n, 263 Wis. 538, 57 N.W.2d 736 (1953).

171. *See supra* notes 151-59 and accompanying text.

172. 394 Mich. 466, 232 N.W.2d 146 (1975) (*Deziel I*), *on remand,* 403 Mich. 1, 269 N.W.2d 1 (1978) (*Deziel II*).

173. 394 Mich. at 470-71, 232 N.W.2d at 148.

174. *Id.* at 472, 232 N.W.2d at 148-49.

or three years of his work, claimant, a sixty-five year old retiree, became increasingly irritated and nervous because the afternoon shift workers occasionally took the defective parts from his department and installed them in the new cars. Claimant worried about the safety of the new cars; furthermore he had to work harder, because he had to recount the remaining defective parts and account to his supervisors for the missing ones. The stress from this activity allegedly caused his disabling mental condition.[175]

The Michigan administrative law judges awarded compensation in all three cases. The appeals board, however, reversed the awards[176] on the ground that the injuries did not arise out of the claimants' employment but out of their personal emotional dispositions. The board found that a psychiatrist had treated Deziel for the identical ailments prior to her employment with defendant; Bahu had experienced a complex emotional cultural disassociation upon coming to the United States from Iraq; MacKenzie suffered from internal hypochondrial neurosis, which had intensified.[177]

On appeal the Michigan Supreme Court declared its uncertainty whether the appeals board had applied the appropriate arise-out-of employment standard to each case. Because the board potentially had applied an erroneous standard, its decisions were subject to review.[178] The court stated that the appropriate arise-out-of employment inquiry was the aggravate, accelerate, or combine with standard.[179] The court directly addressed the arise-out-of employment standard implicit in the decision of the appeals board in *MacKenzie*. According to the court, the board in *MacKenzie* had concluded through "an objective analysis . . . that an actual mental injury caused by a claimant's perception of his work environment is not compensable when that environment is not injurious to the average workers."[180] The court found this standard contrary to the court's analysis in *Carter v. General Motors Corp.*[181] and ruled that in mental disability cases "a subjective standard (i.e., the effect of the perceived work environment on the claimant) is used when determining whether the injury arose-out-of the employment."[182] The court

175. *Id.* at 473, 232 N.W.2d at 149.
176. *Id.* at 471-73, 477-79, 232 N.W.2d at 148-49, 151-52.
177. *Id.*
178. *Id.* at 475, 232 N.W.2d at 150.
179. *Id.* at 475-76, 232 N.W.2d at 150.
180. *Id.* at 479, 232 N.W.2d at 152.
181. *Id.*
182. *Id.*

then remanded the three cases to the appeals board to apply the aggravate, accelerate, or combine with standard from the subjective perspective of each claimant.[183]

On remand the appeals board expressly applied the aggravate, accelerate, or combine with standard, although not from the subjective perspectives of the claimants. In *Deziel* the board held that claimant had not met the more-probable-than not burden of proof necessary to satisfy the aggravate, accelerate, or combine with standard. The board concluded in *Bahu* that Bahu's employment precipitated his injuries. In *MacKenzie* the board declared that the disability arose from an imagined, internal stimulus that only existed in claimant's mind. The board concluded, therefore, that it could not "infer from the facts" that the employment aggravated or accelerated the disability.[184]

The Michigan Supreme Court, after remand, reiterated the appropriateness of the *Deziel I* aggravate, accelerate, or combine with arise-out-of employment standard. The court reaffirmed and elaborated on the *Deziel I* holding that the trier of fact should apply the standard from the claimant's subjective perception of the causal relation.[185] The court declared that a claimant is entitled to compensation if he "honestly perceives" that his mental disorder occurred during his employment, even though his subjective perception of the cause of the injury might be mistaken.[186] The *Deziel II* court's central justification for the "subjective causal nexus" standard was that mental disabilities are subjective in nature. Thus, an objective arise-out-of employment standard would not suffice because an objective inquiry ultimately was indeterminable.[187] Accordingly, the court re-

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183. *Id.* at 480, 232 N.W.2d at 152.

184. *Deziel II*, 403 Mich. 1, 13-14, 16-17, 19-20, 268 N.W.2d 1, 4-5, 6, 8 (1978) (after remand).

185. *Id.* at 25-26, 268 N.W.2d at 10-11.

186. The court held:

> [I]n 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 . . . 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 . . . even though [a plaintiff] mistakenly . . . believes that he is disabled due to that work-related injury and therefore cannot resume his normal employment.

Id. at 26, 268 N.W.2d at 11 (emphasis in original).

187. The court noted:

> Simply stated, psychoses and psychoneuroses are mental disorders which are rooted in unconscious mental causes. . . . [I]t is only logical that we employ a *subjective* standard in determining whether the claimant's employment combined with some internal weakness

versed the board's decisions on remand in *Deziel* and *MacKenzie*.[188]

V. Critique

A. *The Policy Bases of the Threshold Limitations*

In mental disability cases courts have adopted, either implicitly or expressly, threshold limitations that derive from personal injury or accidental injury concepts to assure the genuineness of a mental disorder in an employment context.[189] Courts have perceived the several threshold requirements—that a mental injury result from a physical impact, a physical injury, a mental impact, or gradual mental stresses

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> or disease to produce the disability. A subjective standard acknowledges that the claimant is "mis-manufacturing" or misperceiving reality, otherwise the person would not be a psychoneurotic or psychotic by definition.

Id. at 29-30; 268 N.W.2d at 12-13. Moreover, "[a]ny objective causal nexus standard would not suffice" because

> almost all psychoneuroses and psychoses are, to some degree, latent in origin. The claimant's predisposition for such disabilities usually can be traced back to childhood. . . .
>
> Any objective causation standard, whether it be in the form of the "but-for" or the "aggravation-acceleration" rule, will be of little assistance in deciding whether to award compensation in cases involving psychoneuroses or psychoses. . . . [I]n most cases a constellation of psychodynamic factors is involved; therefore, it is almost impossible to weigh the causal significance of any one factor.

Id. at 27-28, 268 N.W.2d at 11-12.

The court posited two additional justifications for its arise-out-of employment standard. First, the court found that the precedent established in Carter v. General Motors, 361 Mich. 577, 106 N.W.2d 105 (1960), compelled the "subjective perception" standard. The *Deziel II* court observed that in *Carter* it had upheld the administrative finding that claimant had satisfied the arise-out-of employment requirement. The *Carter* court had based this finding on testimony by an expert witness that claimant " 'saw himself in an impossible situation in which he couldn't win . . . [and] which had no solution.' " *Id.* at 583, 106 N.W.2d at 108. Accordingly, "a careful reading of Carter leads to this inescapable conclusion that [this court] employed the subjective standard in determining whether plaintiff's claimed disability and injury . . . was compensable." *Deziel II*, 403 Mich. at 31, 268 N.W.2d at 13. Second, the court found the subjective causal nexus standard justifiable because the arise-out-of employment requirement "should always be read progressively or liberally," *id.* at 34, 268 N.W.2d at 15, that is, " 'for compensation.' " *Id.* at 34 n.14, 268 N.W.2d at 15 n.14.

For an analysis of *Deziel I & II*, see Joseph, *supra* note 2, at 1108-23, 1130-34; Note, Deziel v. Difco Laboratories, Inc.: *Michigan's Response in Awarding Worker's Compensation Benefits for Mental Injuries*, 1979 Det. C.L. Rev. 173.

188. *Id.* at 40, 43, 268 N.W.2d at 17, 18.

Although the dissent in *Deziel II* accepted the majority's analysis of the complex etiology of mental disorders, *id.* at 53, 268 N.W.2d at 24 (Coleman, J., dissenting), it argued that because of this complex etiology, the result of the subjective perception standard would be that every mentally disabled employee would perceive the cause of his injury as employment related. *Id.* at 54, 268 N.W.2d at 24. The dissent proposed an "aggravate, accelerate, or combine with" arise-out-of employment standard, which the court would apply from the perspective of an average employee. *Id.* at 61 n.14, 268 N.W.2d at 27 n.14. The dissent added that this causal standard "must be established in some substantial degree." *Id.* at 61, 268 N.W.2d at 27.

189. *See supra* notes 105, 110-12, 136-38, & 147 and accompanying text.

"unusual or excessive to the point that the average worker would experience an adverse emotional reaction"—to provide some objective measure of the employment's causal contribution to the injury.[190] The policy rationale for these limitations is that they counterbalance the subjective nonemployment factors that integrally contribute to a mental disability.[191]

Courts universally have refused to limit recovery at the threshold if a physical impact stimulus or a physical injury causes a mental disability.[192] A majority of courts, moreover, have extended the threshold to include a mental disability that results from a mental impact stimulus.[193] The rationale underlying this approach has been the recognition that medically a "shred of the 'physical' " does not assure a causal relation between a mental disorder and employment.[194] The Massachusetts, Wisconsin, Arizona, and Maine Supreme Courts have extended the mental impact threshold even further to include gradual mental stresses that result from objectively determined unusual or excessive employment conditions.[195]

The existence of a mental impact stimulus or unusual excessive mental employment stresses, however, does not medically assure the genuineness of the causal relation between a worker's mental disability and his employment any more than does the existence of a physical impact. The intensity of the mental stresses is etiologically irrelevant.[196] The metaphorical description of the threshold limitations by courts as "sufficient badge[s] of reliability,"[197] therefore, is accurate: like the objective criteria in tort actions for emotional injury, these "badges" at best assure the *appearance* of an objective causal relation.[198]

B. The Policy Bases of the Arise-Out-Of Employment Inquiry

Courts that have rejected threshold inquiries in mental disability cases have grounded their reasoning on the central purpose of the workers' compensation system. They have argued that the system should not treat differently a worker who suffers a mental disability

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190. *See supra* notes 105, 112, 136-38, & 147 and accompanying text.

191. *Id.*

192. *See supra* note 104 and accompanying text.

193. *See supra* note 109 and accompanying text.

194. *See supra* note 110 and accompanying text.

195. *See supra* notes 118-48 and accompanying text.

196. *See supra* note 32 and accompanying text.

197. The Maine Supreme Judicial Court in Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1018 (Me. 1979), used this description.

198. *See supra* note 52 and accompanying text.

as a result of traumatic or gradual employment stresses from a worker who suffers a physical injury because of the same stresses.[199] A claimant should receive compensation if his disabling injury arose out of his employment—regardless of its physical or mental nature. Thus, these jurisdictions appropriately locate the causation issue in the arise-out-of employment standard. Moreover, because claimants in mental disability cases by definition are subjectively predisposed to mental injury, the appropriate arise-out-of employment inquiry is whether the employment aggravated, accelerated, or combined with the claimant's preexisting susceptibility to produce his disability.[200] The claimant must satisfy this standard by a preponderance of factual probabilities.[201]

A trier's factual determination of the aggravate, accelerate, or combine with arise-out-of employment standard, however, also contains a policy based evaluation. A trier cannot ascertain the preponderance of factual probabilities without factually assessing the probabilities in some quantitative or qualitative sense. Yet a complex interrelation exists between the subjective and environmental realities that contribute to a worker's disability. This interrelation is neither quantifiable nor qualifiable; the trier cannot measure respective causative probabilities of a mental disorder.[202] The trier, therefore, inevitably confronts an evaluative dilemma when determining the aggravate, accelerate, or combine with arise-out-of employment standard in mental disability cases. A claimant's subjective mental stresses, his employment stresses, or his nonemployment environmental stresses each quantitatively or qualitatively may have contributed to his disability in a more-probable-than-not sense. Thus, a trier, consistent with medical knowledge, makes a compensation determination in every mental disability case based on his evaluative sense of whether employment stresses—rather than personal or nonemployment stresses—aggravated the claimant's condition in a more-probable-than-not sense; although employment stresses may always be an aggravating element,[203] the trier is unable to determine whether the employment aggravation is based on a preponderance of

199. *See supra* notes 159-60 and accompanying text.

200. *See supra* notes 163-65 and accompanying text.

201. *See supra* notes 166-67 and accompanying text.

202. *See supra* note 31 and accompanying text.

203. One commentator has recognized that the Michigan court reached this conclusion in Carter v. General Motors, 361 Mich. 577, 106 N.W.2d 105 (1960): "Following the logic of *Carter* . . . , all mental illness, neurotic and psychotic, incurred by an employee can be attributed to job pressure because there is always a history of increasing tensions on the job before any precipitate outbreak of mental pathology." Robitscher, *supra* note 2, at 254.

factual probabilities.[204]

Moreover, a trier's evaluative determination of the aggravate, accelerate, or combine with arise-out-of employment standard in mental disability cases allows an appellate court to assert its evaluative preferences through its functional utilization of the principles of judicial review of administrative decisions. On review an appellate court can affirm a trier's evaluative decision by holding that it was factual and, therefore, conclusive. Conversely, a court can make a different evaluative decision by reversing the trier on the implicit grounds that the trier accorded improper evidentiary weight to either the contributing subjective and nonemployment factors or to the contributing employment factors. The court, therefore, could reverse the trier's decision because the trier did not base its conclusions on substantial evidence or because it applied an erroneous standard of proof.[205]

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204. A possible exception to this conclusion is the situation in which an individual suffers a mental disorder as a direct result of an organic injury to his central nervous system. See *supra* notes 19 & 26 and accompanying text for a discussion of organic mental disorders. A court, however, just as easily could categorize an organic injury to the nervous system as a "physical"—rather than a "mental"—injury. Therefore, this type of injury arguably would be outside the "mental disability" category of analysis.

The conclusion that the arise-out-of employment inquiry in mental disability cases inherently is evaluative applies to any disabling injury with an etiology that comprises contributing personal and environmental factors which are impossible to quantify or qualify. Heart attack and back injuries are other examples of disabling injuries of unknown etiology. *See* P. BARTH, *supra* note 2, at 80-86. In 1953 Professor Small first noted the evaluative nature of the arise-out-of employment determination in workers' compensation cases that concerned disabling injuries of unknown, unquantifiable etiology. Small, *supra* note 2; *see* Malone, *supra* note 2, at 61-68; Comment, *Workmen's Compensation Awards, supra* note 2, at 1143-45. Dr. Mitchell has affirmed this conclusion:

> The attempt to allocate percentage values to the [heart attack] patient as compensation for an acute attack further clouds the picture. Many physicians feel that stress on the job may have an effect. Certainly the life style of the patient taken as a whole must also have an effect. How can one decide that *this* percentage of the workers' condition is due to his occupation, while *that* portion is due to other factors? . . . [Workers' Compensation] boards and physicians are forced into making these value judgments, even though there is little scientific basis for them.

Mitchell, *Some Medical Issues in Workmen's Compensation*, in 2 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 355, 358 (1973) (footnotes omitted) (emphasis added).

205. *See supra* notes 168-71 & 178-83 and accompanying text. The evaluative nature of the appellate decision essentially does not change when a court adopts a stricter standard of proof than the preponderance of probabilities standard. A standard similar to the one that the Maine court advanced—"ordinary work-related stress and strain [is] compensable *if it is shown by clear and convincing evidence* that the trauma generated by the employment *predominated* in producing the resulting injury," Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1019-20 (Me. 1979)—indicates an evaluative decision because the trier of fact still must confront a factual determination that is impossible to measure in probability terms. For a discus-

The Michigan Supreme Court did not recognize the evaluative policy based underpinnings of the arise-out-of employment issue in its landmark *Deziel I* and *Deziel II* opinions,[206] although the decisions of both the court and the appeals board contained an evaluative dimension.[207] In *Deziel I* the court utilized appellate review principles to examine the appeals board's denial of compensation in *Deziel, Bahu,* and *MacKenzie.* Uncertain whether the board had applied the aggravate, accelerate, or combine with arise-out-of employment test, the court found a potentially erroneous application of the appropriate legal standard.[208] The court also stated that the board should apply this standard from the subjective perspectives of the individual claimants.[209] Under this interpretation the board had to give determinative evidentiary weight to the contributing subjective elements of the claimants' mental disabilities. On remand in *Deziel* and *MacKenzie* the appeals board made an evaluative determination that the claimants did not prove that their employment aggravated their mental disabilities in a more-probable-than-not sense.[210] In *Deziel II* the court reasserted the applicability of the subjective arise-out-of employment test. The court argued that medical knowledge compelled use of the standard because mental disabilities are essentially subjective. The court rejected an objective standard because of the medical impossibility of measuring the causal significance of an employment event.[211]

The *Deziel II* approach, however, clearly does not conform to medical knowledge because it does not take into account the integral contribution of employment stress to an employee's mental injury. Mental disorders occur as a consequence of a psychogenic and psychodynamic relationship between an individual's subjective self and his environment, including his employment.[212] Furthermore, the impossibility of weighing the etiological elements in mental disability cases also arises when the trier attempts to measure the causative contribution of the claimant's subjective perceptions. In actuality,

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sion of the Maine standard, see *supra* text accompanying notes 192-95. Moreover, a "clear and convincing evidence" or "predominate cause" standard would not lessen the appellate court's functional ability to insert its evaluative choice of the causative elements of an alleged work related mental disability.

206. Joseph, *supra* note 2, at 1130-34.

207. *Id.* at 1133.

208. *See supra* note 78 and accompanying text.

209. *See supra* note 182 and accompanying text.

210. *See supra* note 184 and accompanying text.

211. *See supra* notes 185-87 and accompanying text.

212. *See supra* notes 26-29 and accompanying text.

the *Deziel II* court based its standard not on medical knowledge, but on an admitted policy preference for "[c]ompensation for [mental] disability . . . over any subsidiary doubts about the existence of an objective causal nexus."[213]

The ramifications of the policy based determinations that underlie the arise-out-of employment inquiry in mental injury cases compel two conclusions. First, in jurisdictions that have rejected policy based threshold limitations, a trier and an appellate court must make an evaluative decision when determining the arise-out-of employment inquiry.[214] Second, in those jurisdictions that impose threshold limi-

213. *Deziel II*, 403 Mich. at 35, 268 N.W.2d at 15. *See* Joseph, *supra* note 2, at 1131-32; *supra* note 187 and accompanying text.

214. Three state courts have held that the triers of fact can make the policy or legal causation inquiry in mental disability cases pursuant to their state statutes' "general coverage" occupational disease provisions. In Sawyer v. Pacific Indem. Co., 141 Ga. App. 298, 233 S.E.2d 227 (1977), tbe Georgia Court of Appeals declared that claimant's psychosis arguably was an occupational disease. The court remanded the case to the Georgia Medical Board—wbich the state had established by statute to resolve occupational disease claims—to apply Georgia's statutory standards for occupational disease: "[that a] causal condition [exists] between the work and the disease, following exposure occurring by reason of employment, with no substantial exposure outside employment; that [the disease] is not an ordinary disease of life to which the general public is exposed; that [the disease] had its origin in a risk connected with the employment. . . ." *Id.* at 302-03, 233 S.E.2d at 231. See *supra* note 108 for a discussion of the facts in this case.

In James v. State Accident Ins. Fund, 44 Or. App. 405, 605 P.2d 1368 (1980), the Oregon Court of Appeals held that the state can compensate a claimant's anxiety and depressive neurosis as an occupational disease. The court affirmed claimant's compensation award after applying the Oregon Supreme Court's test to determine the compensability of an occupational disease related to a preexisting condition: a claimant must "prove by a preponderance of evidence that (1) his work activities and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services." *Id.* at 411-12, 605 P.2d at 1371. The court expressly rejected defendant's contention that the court should analyze claimant's disability "in terms of the accidental injury portion of the Workers' Compensation Act." *Id.* at 408-09, 604 P.2d at 1370.

Claimant in Martinez v. University of Cal., 93 N.M. 455, 601 P.2d 425 (1979), developed a cancerous growth on his eye following exposure at his work to radioactive materials. After surgical removal of the growth, he suffered an extreme, disabling anxiety neurosis that manifested itself as a phobia of radioactive exposure. The New Mexico Supreme Court held that his injury was actionable as an occupationl disease. Although the statute required that an occupational disease be "peculiar to" the occupation, the court stated that claimant needed to show only a " 'recognizable link' between [this] disease and some distinctive features of his job." *Id.* at 457, 601 P.2d at 427.

These cases illustrate the different judicial attitudes that exist toward the legal causation inquiry under "general coverage" occupational disease provisions. These provisions "require the courts to distinguish between occupational diseases and 'ordinary diseases of life.' " W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 258. They usually define the term "occupational disease" to "include any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." 1A A. LARSON, *supra* note 2, § 41.00. Thus, analytically, when a disease is "so obviously related to conditions peculiar to the industrial activity of the employer, . . .

tations, policy decisions occur at two stages: at the threshold level and, if the threshold is satisfied, at the arise-out-of employment inquiry.

C. *The Policy Issues*

The subjective dimension of mental disorders creates policy apprehensions that permeate judicial attitudes toward mental injuries in both the tort and workers' compensation systems.[215] A fundamental jurisprudential difference, however, distinguishes the two systems. Under the common law, courts essentially have unlimited power to establish loss-shifting formulas that expressly reflect policy choices. These policy based formulas develop within the procedurally defined domains of the judge and the jury. The trial process, therefore, assimilates the policy decisions in mental injury cases as it does other common-law policy based determinations.[216]

Under workers' compensation systems, the system's central policy compromise between worker and employer limits a court's options. On the one hand, the system compels an employer to pay compensation benefits for disabling injuries only if the injuries result from employment related risks that the legislature has defined. On the other hand, an employee may receive benefits only if such a risk caused his disabling injury. The primary statutory embodiment of this policy is the arise-out-of employment inquiry, in which the trier

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there is not much trouble in bringing [it] within the scope of the statutory definition." W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 258. See *supra* note 71 and accompanying text for a discussion of the legal causation dimension of "general coverage" occupational disease provisions. When a claimant suffers a disease that is fairly common to ordinary life—such as a mental disorder—the analytical process is complicated:

> The courts are torn between the statutory injunction that diseases of ordinary life are not to be covered and the realization that in fact the disease involved was a definite risk of the employee's job. . . . If the risk of contracting the ailment is greater than that to which the general public is subjected and the causation is reasonably certain, [courts are] likely to rule that the disease is compensable.

W. MALONE, M. PLANT, & J. LITTLE, *supra* note 2, at 258. If a court chooses to utilize a compensation statute's occupational disease provision to determine the causation issue in mental disability cases, the judicial decision still will rest on an evaluative decision. The analytical key to determining the applicability of an occupational disease case will be the clear presence of a factual causal relationship between the disability and the employment. Because it is impossible to prove a causal relationship in mental disability cases, a trier and an appellate court—through the traditional review process—necessarily will engage in evaluative decisionmaking. The ultimate analytical result, therefore, is no different from the result when the trier applies the arise-out-of employment inquiry.

215. *See supra* notes 38, 45, 51, 57, 105, 106, 112, 134, & 147 and accompanying text.

216. *See supra* notes 53 & 56 and accompanying text.

decides whether a risk is employment related.[217]

The most pronounced policy justification for the threshold limitations that courts impose in workers' compensation mental disability cases and mental injury tort actions is the need to assure the causal genuineness of the injury.[218] These objective limitations, however, do not medically assure genuineness: at best, they assure an appearance of genuineness.[219]

Although the "appearance of genuineness" justification clearly is within a court's common-law policy making power,[220] this rationale and the threshold approaches that emanate from it are inherently repugnant to the central legislative policy of the workers' compensation system. Under the threshold approaches a court may deny benefits to a mentally disabled employee if his injury did not arise from physical or mental stimuli with the "appearance of genuineness," although the claimant may have suffered a genuine employment related mental disability from gradual, ordinary employment stresses. Equally repugnant to the system's policy is the rationale that threshold limits are necessary to prevent the workers' compensation system from becoming a social insurance system.[221] This argument relies on the premise that mentally disabled claimants who cannot satisfy the threshold limitations have not suffered genuine work related mental disorders and, therefore, will not receive benefits. The effect of threshold limits, instead, is potentially to deny benefits to claimants who genuinely may have suffered work related mental injuries that did not result from physical impact, mental impact, or unusual, excessive mental stresses.

The threshold limitations in mental disability cases, therefore, reflect policy choices that potentially frustrate the purpose of the workers' compensation system. These limitations can create a class of claimants that is underinclusive: a claimant who has suffered a work related mental disability may not receive benefits if the stimuli causing his injury do not satisfy the threshold requirements. The physical impact approach denies recovery to a mentally disabled claimant whose injury may have arisen from acute or chronic nonphysical stimuli induced by an employment event.[222] The mental impact approach disallows compensation when gradual mental stimuli may

217. *See supra* notes 60 & 80-81 and accompanying text.
218. *See supra* note 215 and accompanying text.
219. *See supra* notes 52 & 196 and accompanying text.
220. *See supra* notes 53-55 and accompanying text.
221. *See supra* notes 117 & 132-34 and accompanying text.
222. *See supra* notes 101-05 and accompanying text.

have caused the mental disability.[223] The objective unusual or excessive stress approach denies benefits to claimants when ordinary daily employment stresses may have created the mental disorder.[224]

The arise-out-of employment inquiry, essential in every mental injury case under workers' compensation, arises from evaluative, policy based decisions, because the necessary factual causal relation between employment under an "aggravate, accelerate, or combine with" arise-out-of employment standard is impossible to prove in a more-probable-than-not sense. The factual causation inquiry in mental injury tort actions—an inquiry that is assimilated analytically into the judge-jury decisionmaking process—also is evaluative in nature.[225] In workers' compensation mental disability cases, however, the evaluative factual causation inquiry frustrates the system's central purpose. Because the administrative trier cannot factually determine the cause of mental injuries in a more-probable-than-not sense, the trier's decision must reflect an evaluative policy preference for or against compensation.[226] If the trier is favorable toward compensation, its decisions may create an overinclusive class of beneficiaries: some claimants may receive compensation who may not be entitled to benefits because their employment did not in a more-probable-than-not sense aggravate their susceptibility to a mental disability. If the trier's evaluative preference is against compensation, its decision potentially creates an underinclusive group of claimants; some claimants who may deserve compensation because their employment more-probably-than-not aggravated their susceptibility to a mental disability may not receive benefits. The system then shifts the same evaluative decisions to the appellate court through the appellate review process.[227]

The inevitable conclusion is that judicial approaches to work related mental disabilities reflect policy choices that potentially frustrate the central legislative purpose of workers' compensation systems. Although the legislature has effected a compromise between workers and employers that grants benefits to employees if their injuries are related to their jobs, standards of review that rely inherently upon evaluative judgments result in a class of claimants that is either

223. *See supra* notes 104-49 and accompanying text.

224. *See supra* notes 150-60 and accompanying text.

225. *See supra* notes 46-57 and accompanying text.

226. *See supra* notes 203-04 and accompanying text.

227. *See supra* note 205 and accompanying text. This conclusion also applies when courts adopt a stricter standard of proof in mental disability cases. *Id.*

under or overinclusive.[228] Consequently, workers' compensation mental disability cases proceed within a profound analytical and policy dilemma.

VI. Solutions

A court or legislature that confronts the causation issue in workers' compensation mental disability cases—or, by analogy, workers' compensation actions concerning other diseases of unknown etiology such as cardiovascular and back related disabilities—must recognize that regardless of technical or policy justification, any approach to the issue potentially frustrates the legislative purpose of the workers' compensation system.[229] Therefore, under one approach to the issue, a legislature or court could exclude mental disabilities and other work related illnesses with unknown etiologies from the coverage of workers' compensation systems.[230] A mentally disabled employee's exclusive redress thus would be against his employer or coemployees using applicable mental injury tort principles.[231] In support of this decision a court could argue that the judiciary must not engage in a process of statutory interpretation that forces it potentially to frustrate the legislative purpose of the statute.[232] Furthermore, a court

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228. The problem of over and underinclusion can arise in jurisdictions that administer their workers' compensation systems through the judicial process. Although the policy and factual causation inquiries in mental disability cases occur in these jurisdictions within the appropriate procedural domains of a judge and jury, the causation determinations, nevertheless, are bottomed on evaluative decisions. In these jurisdictions a judge or a jury and an appellate court that is bound by civil procedural principles makes the evaluative decisions, rather than an administrative trier and an appellate court. The ultimate substantive effect is the same in either process. For a discussion of the administrative structure of workers' compensation systems, see *supra* notes 65-69 and accompanying text.

229. *See supra* notes 215-28 and accompanying text.

230. *See* P. Barth, *supra* note 2, at 278-79. Professor Barth argues:

> The problems raised by the ways the various state systems have grappled with the tough issues of etiology are so great that a policy of status quo cannot be defended. Basic changes should be made that explicitly confront the issues of unknown etiology. Those diseases whose etiology is unknown should not be covered in the manner that currently prevails in most states. For courts or juries [in workers' compensation cases] to decide etiological matters when science does not have any answers creates an unacceptable burden for them and necessarily results in capricious decisions.

Id. at 278. Professor Barth concludes that cardiovascular disabilities—which, like mental injuries, "cannot yet be linked scientifically to the workplace"—"should be dropped from [workers' compensation] coverage." *Id.* at 278-79.

231. This approach would have the collateral advantage of eliminating a difficult and controversial issue of emerging importance in workers' compensation law: whether the remedy for a mental disability allegedly caused by the intentional misconduct of an employer should be exclusive to the workers' compensation or tort system. For an analysis of this issue, see 2A A. Larson, *supra* note 2, § 68.34.

232. *See* J. Bentham, Of Laws in General, ch. XIV (H.L.A. Hart ed. 1970); James, *Indi-*

could contend that the common-law judge-jury decisionmaking process is a much more appropriate forum for resolving the distributive issues that arise out of mental disability cases than is the administrative and appellate structure of the workers' compensation system.[233] If the legislature decides to exclude mental disabilities from coverage under the workers' compensation system, its act also would imply that the common-law process is the correct forum in which to resolve

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viduation of Laws, in BENTHAM AND LEGAL THEORY (M. James ed. 1973). A court, of course, could choose to engage in an interpretation of the statute and take an arguably interventionist position. For a discussion of this alternative judicial approach, see *infra* notes 238-46 and accompanying text.

233. Application of the distributive principles underlying enterprise insurance reveals that the consumer of the product will bear the ultimate cost of mental injuries, regardless whether the workers' compensation or tort system is the decisionmaking body. Liability insurance initially will absorb the cost of the injuries under the tort system; workers' compensation insurance will do the same under workers' compensation systems. In both instances this expense will pass horizontally into the marketplace in the form of an increased price of the product and will spread among ultimate consumers. Whether employers can pass the increased cost on to consumers will depend upon a variety of circumstances, including the employers' monopoly position, growth rate, stage of development, competitive position, and flexibility of output, demand, and resource supply. *See* Calebresi, *supra* note 15.

Using the tort system to compensate mental injuries will make the policy roles of the judge and the jury much more important than they are under the present system. The full effect of the factual and policy causation issues inherent in every potential work related mental injury action then will fall upon the tort system. The ultimate administrative burden then might be substantial enough to compel the legislature to respond directly to the issue. For a discussion of legislative approaches to mental injuries, see *infra* notes 234-37 and accompanying text.

A profound jurisdictional problem would arise if the judiciary were to exclude mental injuries from the workers' compensation system. A workers' compensation administrative trier or a trial court initially would have to decide whether an employee suffered a "mental disability"—which would give the claimant jurisdiction to proceed in tort against an alleged wrongdoer—or a "physical disability"—which jurisdictionally would make the claimant's exclusive remedy a workers' compensation claim. Since the distinction between a "mental" and a "physical" injury is medically spurious, *see supra* note 25 and accompanying text, the administrative trier or the trial court would have to engage in an evaluative threshold definitional decision. Arguably, the judicial decision to exclude mental disabilities from the workers' compensation system merely would shift the evaluative problem from the causation issues to the threshold definitional issue.

One response to this argument is to have a trial court decide the jurisdictional question as a matter of law. Another, more theoretical, answer is that the policy effect of an evaluative threshold definitional decision is different from the policy effect of the evaluative causation decision because the latter does not directly conflict with the legislative *quid pro quo.* The determination instead is a secondary policy inquiry required only after the courts have made the primary policy decision to adopt an approach to mental disabilities in accord with the legislative purpose of the workers' compensation system.

The attempt generically to classify an injury as "mental" or "physical" has proved analytically troublesome and undoubtedly will remain so. For a discussion of the potential analytical ramifications of the mental/physical distinction, see Joseph, *supra* note 2, at 1134-36, 1138-39. For a discussion of the impact of the definitional-jurisdictional problem on other approaches to the mental disabilities causation issue, see *infra* notes 234, 237, & 246 and accompanying text.

the distributive issues that arise in mental disability cases.[234]

Under a different approach to the causation issue, a legislature could define a causation standard, or a more specific standard of proof for mental disabilities.[235] The decision would reinforce the legislative intent to resolve the distributive considerations within the administrative and benefit structure of the workers' compensation system. This legislative approach, of course, would preempt the judiciary from excluding mental disabilities from the workers' compensation system.[236] Several problems, however, potentially arise. First, a legislative standard unequivocally must indicate the legislative policy preference either "for" or "against" compensation. An ambiguous standard would force the administrative trier to engage in essentially the same evaluative inquiry that it already pursues in its interpretation of the arise-out-of employment formula. Second, even if the administrative trier believes that its evaluative choice is in accord with the intent of a legislature's mental disability provision, the choice still will shift to the appellate court level under the guise of the findings of fact-question of law distinction. The ultimate decision whether the mental disability provision applies, therefore, will remain vulnerable to the evaluative position of the appellate court.[237]

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234. The broad jurisdictional question whether the legislature or the judiciary is best suited to make the exclusion decision is beyond the scope of this Article. *See* R. KEETON, *supra* note 12, at 3-24, 147-68. The mental/physical threshold jurisdictional issue also would arise if the legislature made the exclusion decision.

235. The Michigan Legislature has adopted this approach. The statutory language applicable to mental disabilities under the Michigan Act provides:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof.

1980 Mich. Pub. Acts 357, §§ 301(2), 401(c), *amending* MICH. COMP. LAWS ANN. §§ 418.301(1), (2), .401(c) (Supp. 1980-81). For a comprehensive analysis of the statutory provision, see Josepb, *supra* note 2, at 1134-46.

236. *See supra* note 71 and accompanying text.

237. *See* Joseph, *supra* note 2, at 1145-48. A third problem would be the mental/physical threshold jurisdictional issue. *Id.* at 1138-39.

The legislature alternatively might address the mental disability causation issue by requiring that the trier apportion an employee's mental disability award according to the perceived proportion of employment related contribution. Drs. Smith and Solomon have recommended this approach. *See* Smith & Solomon, *supra* note 2, at 138-47. Another way to implement the apportionment concept is to establish a second injury fund, which would make the employer "ultimately liable only for the amount of disability attributable to the particular injury occurring in his employment, while the fund pays the difference between that amount and the total amount to which the employee is entitled for the combined effects of his prior and present injury." 2 A. LARSON, *supra* note 2, § 59.31(a).

Both legislative approaches, however, would retain the coverage formula as the primary

If a legislature does not enact a mental disability provision, a court might decide to continue to include mental disabilities under the coverage of the workers' compensation system. Under this approach the judiciary would posit its belief that the workers' compensation system, rather than the common-law decisionmaking process, should resolve cases of work related mental disabilities and the distributive issues collateral to compensating them. Because the workers' compensation decisionmaking process potentially conflicts with the essential purpose of the workers' compensation system, this judicial decision would be jurisprudentially problematic.[238]

A court could remedy the questionable jurisprudence underlying its adherence to the workers' compensation system by *expressly* recognizing that the causation standard—regardless whether its roots are in a threshold inquiry or the arise-out-of employment requirement—potentially will frustrate the essential legislative purpose of the workers' compensation system. The court also should acknowledge the possible under or overinclusive effect of the causation standard. Moreover, the court should declare forthrightly the policies that the standard effectuates, and require the parties to argue the complex and often competing policy ramifications of the proposed standard. For example, the parties might address projected benefit, rehabilitative, and employer insurance costs;[239] administrative costs in terms of the judicial efficiency in applying a standard; the potential increase or decrease in the number of claims and appeals; the relationship between a standard's potential coverage and the potential coverage for mental disorders under collateral governmental or private systems;[240] a standard's deterrent effect on employers to provide an employment environment conducive and sensitive to mental

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policy causation inquiry. They, therefore, would not eliminate the evaluative nature of the causation inquiry or the shifting of the evaluative decision to the appellate courts through the finding of fact-question of law distinction.

238. *See supra* notes 215-18 and accompanying text.

239. *See* Goldstone & Collins, *Concepts of Vocational Rehabilitation*, in MENTAL HEALTH AND WORK ORGANIZATION 251 (A. McLean ed. 1970); Hutchinson, *A Look at Rehabilitation*, in 2 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 397 (1973); Kiser, *A Review of Benefit-Cost Analysis in Vocational Rehabilitation*, in 2 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 383 (1973).

240. Among the collateral private benefit systems that the court might consider are private health and disability plans or collectively bargained health disability programs. *See* Henderson, *supra* note 12, at 129-33. The social security system also provides benefits for mental disability. *See* 42 U.S.C. § 423(d) (1976 & Supp. V 1981). The Social Security Act, however, includes a complex offset formula for payments made under workers' compensation. *See* 42 U.S.C. § 424a(a) (1976 & Supp. IV 1980).

health;[241] a standard's impact on the hiring of persons with backgrounds reflecting mental disorder.[242] Parties also should ask the court to consider the distributive justice dimensions of the workers' compensation system.[243] In addition, the court should declare expressly that the standard it adopts is solely an evaluative *policy causation* inquiry.[244] The only factual inquiry is the one that establishes the time, place, and other circumstances attendant to the injury.[245] This step would eliminate the factual causation inquiry—laden with evaluative underpinnings. In addition, a court should express a judicial deference for the trier's policy causation decision or risk consistently utilizing the principles of appellate review to assert *its* evaluative decision. The consequential administrative burden on the system would be enormous.[246]

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241. *See* Comment, *Workmen's Compensation Awards, supra* note 2, at 1146-47; Trice & Roman, *supra* note 2, at 198-99.

242. *See* Comment, *Workmen's Compensation Awards, supra* note 2, at 1145. A court would have to consider the potential substantive effect of the Rohabilitation Act of 1973, 29 U.S.C. §§ 701-794 (Supp. V 1981) (as amended by Act of Nov. 6, 1978, P.L. 95-602, tit. I, § 122(a)(1), 92 Stat. 2984). For an excellent discussion of the effect of the Rehabilitation Act on mentally disabled employees, see Spencer, *supra* note 2, at 669-77.

243. In the context of accidental injury law distributive justice means that the court should distribute the cost of an injury—and ultimately the wealth of a party—according to "who a party is." *See* THE NICOMACHEAN ETHICS OF ARISTOTLE, bk. V, cb. 4, at 114-15 (Ross transl. World's Classics ed. 1954); Fletcher, *supra* note 15, at 547 n.40.

Under the principle of distributive justice, arguably the "imposition of higher rate costs on the employer could be justified in terms of the humanitarian purposes of shifting the risk, as between two innocent parties, to the one who can best bear or distribute the cost." Comment, *Workmen's Compensation Awards, supra* note 2, at 1143 (footnotes omitted). This argument, of course, is conceptually interrelated to the enterprise insurance principle. *See supra* note 233.

A claimant also might argue—as did plaintiffs in *Deziel II*—that courts in mental disability cases should adopt a causation standard with a potentially overinclusive effect on recovery to satisfy the commonly accepted rule of statutory construction that the workers' compensation statutes require liberal construction because of their remedial quality. *See Deziel II*, 403 Mich. at 33-35, 268 N.W.2d at 14-15; *supra* note 187 and accompanying text. The "liberal construction" principle is grounded in distributive justice considerations. *See* Henderson, *supra* note 12, at 126.

The argument for overinclusiveness has arisen in less elaborate form: "[I]n accord with the growing liberality of compensation and as a result of increased awareness of the indefinite origins of industrial injuries, the courts could allow compensation for all psychoneurotic injuries suffered by an employee for the reason that employment, like every other phase of the workers' environment, has in some measure contributed to his injury." Comment, *Workmen's Compensation Awards, supra* note 2, at 1143. For an analysis of the philosophical bases of these arguments, see J. RAWLS, A THEORY OF JUSTICE ch. V, § 43 (1971).

244. Commentaters have recommended a similar conclusion for the causation determination for cardiovascular disabilities. *See* Cohen & Klein, *A Proposed Solution to the Legal Problems of Workmen's Compensation Heart Cases*, in 1 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION OF STATE WORKMEN'S COMPENSATION LAWS 179 (1973).

245. *See supra* note 89 and accompanying text.

246. A court also should be aware of the inherent definitional problems that will arise if it

VII. A PERSPECTIVE

A resolution of the mental disabilities causation issue does not lie necessarily within existing accident compensation systems. The systemic complexity of the work related mental disability causation issue—which extends to causation determination for other disabling diseases of unknown etiology such as cardiovascular and back related diseases[247]—may demand a structural solution.[248] Professor John Burton, former Chairman of the National Commission on State Workmen's Compensation Laws,[249] has recommended a systemic solution in broad outline form. Professor Burton proposes that legislatures enact a system concerned specifically with occupational diseases of unknown etiology. This system, a "Workers' Disease Protection Act," would exist collaterally with the workers' compensation system, and the basic structures of the two systems would be nearly identical. The workers' disease protection system, however, would contain neither a policy requiring injuries to be work related nor a factual causation inquiry. Instead, under the new system, if an employee suffered from a disease of unknown etiology and if the disease disabled him, the employee would receive compensation comparable to that which he would receive under a workers' compensation system.[250]

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adopts a different standard for mental disabilities. The problem of distinguishing between a mental and physical injury will become relevant in determining the applicable causation standard. For a discussion of this problem, see *supra* note 233 and accompanying text.

247. *See supra* note 230 and accompanying text.

248. In 1969 Dean Henderson made the last significant critical attempt to present radical systemic solutions to the problems that the causation issue raises. Henderson, *supra* note 12; *See* Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

249. Congress created the National Commission on State Workmen's Compensation Laws in 1970. The President appointed members of the Commission. Pursuant to the enabling legislation that created it, the National Commission published *The Report of the National Commission on State Workmen's Compensation Laws* (1972), a *Compendium* (1973), and a volume of *Supplemental Studies* (1973).

250. Burton, *supra* note 12. In his introduction Professor Burton declares:

> The halcyon days are gone for workers' compensation and occupational diseases. Less than a decade ago the National Commission on State Workmen's Compensation Laws issued its *Report* that devoted only two pages to the topic of work-related diseases. It is unimaginable that a similar report issued in the 1980s could deal with occupational diseases in such a facile fashion because of three interrelated developments that have occurred in the last decade: first, a growing awareness that the magnitude of the work-related disease problem is substantially greater than previously recognized; second, increasing concern about how the workers' compensation program can deal with occupational diseases; and third, increasing discussion of programs other than workers' compensation that could protect workers afflicted by occupational diseases.

Id. at 1 (footnotes omitted). After discussing the extent of the occupational disease problem and the compensation of these diseases by the workers' compensation systems, *id.* at 2-16, Pro-

The structural advantage of this system is obvious: it simply would eliminate the complex, interrelated, and often competing technical, policy, and systemic problems that the causation issue creates in cases concerning mental disabilities and disabilities that result from other diseases of unknown etiology. An immediate structural objection to this system, however, is equally evident. Employers undoubtedly would argue that the absence of a work related causation formula would increase greatly insurance costs and, consequently, would heighten the price of an employer's product (assuming that the employer vertically could pass the increased cost of insurance into the stream of commerce).[251] The degree to which a workers' disease protection system provides an employee's exclusive remedy against an employer for a disabling disease of unknown etiology and the extent to which benefits under the system are coordinated with benefits received from collateral private and governmental services provide an effective balance against this employer objection. If, after legislative compromise, the new system becomes the exclusive remedy for dis-

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fessor Burton concludes, in agreement with the analysis and critique in this Article, that

> [o]ne underlying reason for the inherent limits on reform in workers' compensation is the multiple causation typical for many diseases. These diseases may result from a mixture of congenital, degenerative, personal, environmental, and work-related factors. Multiple causation enormously complicates the decisions concerning where to draw the general line on the spectrum between compensable and noncompensable diseases and how to make operationalized [sic] that decision. . . . [T]here are multiple dimensions along which the causes of diseases can he arrayed. Along one dimension is work-related factors; along another is hereditary factors; along another degenerative and so on. The complexity of the task of defining in these multiple dimensions the volume of cases that will be compensable almost guarantees that the decision will be arbitrary.

Id. at 18. Professor Burton then proposes the "fundamental precepts" of a "Workers' Disease Protection Act" to resolve the problems that the "multiple causation" dimension of occupational diseases of unknown etiology creates. The primary underpinnings of this system are, first, its application "to selected diseases [only] such as cancer, back cases, or heart attacks. These are the types of diseases where multiple causes are likely and the ability to sort out the contribution of work-place factors from other causative factors is particularly difficult." *Id.* at 21. Second, the system would not include a work related test. "The claimant is required to establish that he was or is an employee and that he has a disease that has caused an impairment that in turn has caused actual loss of earnings." *Id.* at 21-22.

The inclusion of cancer poses serious problems. An employee's cancer, of course, may result from exposure to toxic substances in the workplace. *See* Levy, *The Preliminary Handling of Chemical and Toxic Tort Cases*, 26 PRAC. LAW. 43 (1980); McGovern, *Toxic Substances Litigation in the Fourth Circuit*, 16 U. RICH. L. REV. 247 (1982); Trauberman, *Compensating Victims of Toxic Substances Pollution: An Analysis of Existing Federal Statutes*, 5 HARV. ENVTL. L. REV. 1 (1981). The causation issue in cases of workplace cancers is substantively different from the causation issue in mental disease cases. The issues in compensating occupationally related cancers, therefore, deserve separate analysis. *Id.* The interrelationship between a compensation scheme for occupationally related cancer and the workers' disease protection system is a subject beyond the scope of this Article.

251. *See supra* note 60 and accompanying text.

abled employees against employers, employer and consumer costs might actually diminish. First, an exclusive system would eliminate the litigation costs inherent in the difficult proof problems surrounding the determination of the causal relationship between a worker's employment environment and a disabling disease of unknown etiology.[252] Second, an exclusive system would eliminate the increasingly imaginative and costly efforts of employees and employers to maximize their interests by utilizing the inherent employment or nonemployment dimension of a disabling disease or injury of unknown etiology to either "opt out" of the workers' compensation system into the tort system or "opt in" to the workers' compensation system from the tort system.[253] Third, the cost of the system effectively would diminish if it contained—unlike the workers' compensation system—comprehensive substantive mechanisms by which to coordinate benefits with benefits received from collateral sources.[254] Last, employers' costs could decrease if, as Professor Burton proposes, employee contributions help to finance the system.[255]

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252. *See supra* notes 215-28 and accompanying text. As Professor Burton observes, under the workers' compensation system diseases of unknown etiology present "so much room for honest disagreement . . . tbat tbe inducements to litigation seem irresistible." Burton, *supra* note 12, at 19. Professor Burton does not propose that the workers' disease protection system be completely exclusive. Instead, he suggests that "workers will be able to obtain workers' compensation benefits for the first six months of disability if they can meet the work-related test in that program, [a]fter six months, workers' compensation has no further responsibility for the workers covered by the Workers' Disease Protection Acts." *Id.* at 22. Moreover, he proposes:

> The Workers' Disease Protection benefits would be the exclusive liability of the employer for claims by its employees for diseases, other than the benefits provided during the first six months of disability by other programs. Employees would retain the right to sue third parties for negligence with the exact requirements for recovery to be resolved in later deliberations by the National Commission. Any recovery by an employee against a third party would be reduced by the amount of the Disease Protection benefits. Employers would have no right to recoup any of the Disease Protection benefits paid to their employees from the recoveries against third parties. These rules would presumably reduce the incentives for employers to encourage suits by their employees against third parties and for employees to file the suits in the first place.

Id. at 25.

253. For a critically probing discussion and analysis of the "opting out," "opting in" issue, see M. FRANKLIN, INJURIES AND REMEDIES: TORT LAW AND ALTERNATIVES 783-86 (1979).

254. Professor Burton proposes comprehensive coordination of collateral private and governmental benefits, including an offset of social security retirement, survivor, and medical benefits, and an offset of medical benefits provided under private plans. Burton, *supra* note 12, at 22-23.

255. Professor Burton proposes that the system be financed by equal employer and employee contributions. *Id.* at 23. He adds that the insurance rates for employers would be experience rated. Although the purpose of experience rating is to provide an incentive for employers to reduce the incidence of diseases within the employers' control, Professor Burton argues that a system which eliminates the causation formula still would maintain incentives for a safe work environment:

A system structured along the line of the workers' disease protection system deserves serious attention. A primary purpose of this Article has been to show that mental disabilities and, by analogy, other disabling diseases of unknown etiology such as cardiovascular and back related disabilities, place an enormous and increasing pressure not only on the workers' compensation system, but also on the compensation systems that a worker's compensation inexorably affects. A worker's disease protection system, which structurally reforms the present methods of compensating for these disabilities, provides the kind of solution necessitated by one of the most important and visible issues in personal injury law.

> An employer could he charged for the benefits paid to his disabled workers, whether or not the disabling injuries were work related. This would elimiante any disputes over the cause of the disability. However, if it could be assumed that nonwork-related injuries are distributed randomly among the working population, the system in effect reduces to a fiat-rate tax on all businesses to finance benefits for off-the-job injuries. Obviously, questions such as the credihility to be given to each firm's experience would have to be resolved, but this plan would appear to fulfill the accident prevention and cost allocation objectives of the workmen's disability income system.

Burton, *supra* note 12, at n.43, *quoting* Berkowitz & Burton, *The Income-Maintenance Objective in Workmen's Compensation*, 24 INDUS. & LAB. REL. REV. 34, n.20.

Professor Burton also discusses the insurance mechanism for the system:

> Employers and carriers [would be] liable for all claims filed within five years after the policy year. The employers and carriers also [would be] liable for claims filed more than five years after the policy year expires that are not the responsibility of [a] special fund. The special Disease Protection Fund [would be] liable for all claims filed more than five years after the policy year expires as soon as the incurred losses of the carrier exceed the premiums generated by the pure loss component of the manual rates. The payments from the special Disease Protection Fund [would be] financed by assessments against all carriers and employers that are proportionate to payroll.

Burton, *supra* note 12, at 24-25.