which standard of liability should apply in Iowa. Since *Gertz*, appellate courts in at least three states have rejected the negligence standard in favor of retaining the actual malice approach.[49] Conversely, at least four states have adopted the negligence standard following *Gertz*.[50]

In view of the above criticisms of the application of the negligence standard of liability where a private plaintiff involved in a matter of public interest or concern is defamed, perhaps the actual malice approach should have been retained. Since the *Taskett* decision represents a change in Washington libel law, the majority should have at least dealt more directly with the benefits and drawbacks of that new principle. The *Taskett* court has not adequately explained how the problems with the negligence standard might be overcome or why those problems are not significant enough to warrant attention in the majority opinion. If the Iowa Supreme Court ultimately does adopt the negligence standard, the court should at least elucidate guidelines to be considered in determining what constitutes reasonable care by the public media.

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49. *See* Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo. 1975); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (App. Ct. Ind. 1974); Commercial Programming, Unlimited v. Columbia Broadcasting Systems, Inc., 81 Misc. 2d 678, 367 N.Y.S.2d 986 (Sup. Ct. 1975).

50. *See* Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (Ct. App. 1974), *cert. denied*, 423 U.S. 883 (1975).

WORKMEN'S COMPENSATION*—SUDDEN, SEVERE, EMOTIONAL SHOCK THAT CAN BE TRACED TO A DEFINITE TIME, PLACE, AND CAUSE, AND WHICH PRODUCES A PSYCHOLOGICAL INJURY, IS COMPENSABLE.—*Pathfinder Co. v. Industrial Commission* (Ill. 1976).

Maria Rosa, claimant employee, attempted to extricate a co-worker's hand which had been caught in a punch press. Unaware that the hand had been completely severed, Ms. Rosa reached into the machine and removed the detached mass of bones and tissues that had been the functioning hand of her fellow worker. The claimant fainted and required hospitalization for an anxiety reaction. After returning to work, Ms. Rosa suffered nervousness, numbness, headaches, and vision impairment and developed a fear of machines. Four months after the accident, she quit working and again entered the hospital. The award of compensation by the Industrial Commission was reversed by the Circuit Court of Cook County. The Supreme Court of Illinois *held*, reversed. A sudden severe emotional shock that can be traced to a definite time, place, and cause, and which produces a psychological injury, is compensable under the Illinois workmen's compensation act[1] even though the claimant sustained no physical trauma. *Pathfinder Co. v. Industrial Commission*, 62 Ill. 2d 568, 343 N.E.2d 913 (1976).

With this decision, Illinois aligned itself with a growing number of state courts which have allowed employees to recover for a mental injury resulting from a mental stimulus.[2] In the initial consideration of the claim, the arbitrator

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* The Iowa Code has been amended to change all references to "workmen's compensation" to "worker's compensation." Workmen's Compensation, H.F. 863, 1976 Iowa Acts ch. 1084.

1. ILL. ANN. STAT. ch. 48, § 138.1 et. seq. (Smith-Hurd 1969).

2. 1A A. LARSON, THE LAW OF WORKMAN'S COMPENSATION § 42.23 (1973 & Supp. 1976) [hereinafter cited as LARSON]. Other jurisdictions awarding compensation for a mental injury caused by a mental stimulus include California in Baker v. Workmen's Compensation Appeals Board, 18 Cal. App. 3d 852, 96 Cal. Rptr. 279 (1971); Florida in Lyng v. Rao, 72 So. 2d 53 (Fla. 1954); Michigan in Rainko v. Webster-Eisenlohr, Inc., 306 Mich. 328, 10 N.W.2d 903 (1943); Missouri in Todd v. Goostree, 493 S.W.2d 411 (Mo. Ct. App. 1973); New Jersey in Simon v. R. H. H. Steel Laundry, 25 N.J. Super. 50, 95 A.2d 446 (Hudson County Ct. 1953) *aff'd*, 26 N. J. Super. 598, 98 A.2d 604 (Super. Ct. App. Div. 1953); New York in Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975); Oregon in Kinney v. State Industrial Accident Commission, 245 Ore. 543, 423 P.2d 186 (1967); Texas in Bailey V. American General Insurance Co., 154 Tex. 430, 279 S.W.2d 315 (1955); and Virginia in Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941). Jurisdictions refusing to award compensation include Georgia in Brady v. Royal Manufacturing Co., 117 Ga. App. 312, 160 S.E.2d 424 (1968); Kansas in Jacobs v. Goodyear Tire and Rubber Co., 196 Kan. 613, 412 P.2d 986 (1966); Louisiana in Johnson v. Hartford Accident & Indemnity Co., 196 So. 2d 635 (La. Ct. App. 1967); Pennsylvania in Liscio v. Makransky & Sons, 147 Pa. Super. 483, 24 A.2d 136 (Super. Ct. 1942); and Wisconsin in School District Number 1 v. Department of Industrial, Health & Labor Relations, 62 Wis. 2d 370, 215 N.W.2d 373 (1974). The *Pathfinder* court also cited State Compensation Fund v. Industrial Commission, 24 Ariz. App. 31, 535 P.2d (1975) as a case awarding compensation on the basis of psychological injury alone. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 568, —, 343 N.E. 2d 913, 918 (1976). Arizona is not included by Larson in his list of jurisdictions falling into the mental stimulus-mental injury category. The case does involve a mental stimulus, but the claimant in *State Compensation Fund* was diagnosed as suffering from congestive heart failure—a physical injury.

found that Ms. Rosa was temporarily disabled and that finding was upheld by the Industrial Commission in spite of expert testimony that there was "no objective evidence of any organic disease."[3] The Circuit Court of Cook County reversed the Commission on the grounds that the injury did not arise out of an accident in the course of employment and that the Commission's ruling was contrary to the manifest weight of the evidence. Ms. Rosa's contentions before the Illinois Supreme Court were that the emotional shock she received causing mental injury was compensable under the Illinois statute[4] and that the Industrial Commission's decision was not contrary to the manifest weight of the evidence.[5]

The supreme court's first step in the decision-making process was to distinguish suits under tort law from those under workmen's compensation statutes[6] by specifically stating that it would "decide this [case] independently of . . . common law holdings in tort that deal with the question of whether one may be liable for negligently causing mental distress or harm when there was no physical trauma or impact or harm when there was no physical trauma or impact with the victim."[7] A brief look at the origins of workmen's compensation law reveals the importance of this distinction.

Workmen's compensation laws developed when tort remedies, based on employer liability with its accompanying defenses of contributory negligence and assumption of risk, proved inadequate to meet the needs of modern industry.[8] The outcome of tort actions between employer and employee was uncertain and unsatisfactory.[9] In addition, there was difficulty in obtaining accurate testimony on both sides of the suit[10] and causation was hard to prove.[11] Furthermore,

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The Supreme Court of Iowa has yet to deal with a mental stimulus-mental injury case. This author's research has uncovered no case law which would prohibit the Iowa court from reaching a decision similar to that in *Pathfinder*. The Iowa court's view that workmen's compensation laws are remedial and are to be liberally construed, Crowen v. De Soto Consolidated School District, 246 Iowa 402, 68 N.W.2d 63 (1955), that preexisting conditions will not bar recovery, Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960), and that injury may be sustained to the health as well as to the body, Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 732, 254 N.W. 35, 39 (1939), would seem to suggest that if the proper texts of causation could be met, it is reasonable to believe that compensation would be awarded in Iowa for a mental injury resulting from a mental stimulus.

3. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 568, —, 343 N.E.2d 913, 916 (1976).

4. ILL. ANN. STAT. ch. 48, § 138.1 et seq. (Smith-Hurd 1969).

5. Pathfinder Co. v. Industrial Comm'n 62 Ill. 2d 568, —, 343 N.E.2d 913, 919 (1976).

6. Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975) was the first New York case to allow compensation for a mental stimulus—finding a man with a self-inflicted gun shot wound in the head—resulting in mental injury. The New York Court of Appeals followed the process used by the *Pathfinder* court in distinguishing workmen's compensation from torts. In *Wolfe*, however, the court referred to the decision in Battalla v. State of New York, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961), which eliminated the "impact" doctrine in tort cases. *See generally* Larson, *Nonphysical Torts and Workmen's Compensation*, 12 CAL. L. REV. 1 (1975), for a discussion of whether tort and workmen's compensation remedies are mutually exclusive.

7. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 568, —, 343 N.E.2d 913, 916 (1976).

8. New York Cent. R. R. v. White, 243 U.S. 188, 197 (1917).

9. W. MALONE, M. PLANT & J. LITTLE, THE EMPLOYMENT RELATION 46 (1974).

10. *Id.*

11. *Id.*

financial pressures often forced employees to settle for minimal damages.[12] In other cases, the monetary award was consumed by litigation expenses.[13]

The statutory workmen's compensation scheme has been seen as a compromise between the employer and employee, with the employer who is not at fault giving up an immunity he would otherwise enjoy and with the employee forfeiting his right to full damages in exchange for what would normally be a more modest award of basic compensation.[14] Compensation statutes eliminated the elements of fault, foreseeability, and proximate cause necessary in tort actions[15] and applied a subjective rather than an objective standard to the party injured.[16] It is important to realize that "[w]orkmen's compensation awards are not made for injury as such, but for inability to perform or to obtain work produced by such injury."[17] The Illinois court clearly subscribed to this philisophy of compensation in *Pathfinder*.[18]

The Illinois Workmen's Compensation Act[19] is typical in requiring, for a compensatory award, an accidental injury[20] arising out of[21] and in the course

12. *Id.*
13. *Id.*
14. *Id.*
15. Larson, *Range of Compensable Consequences in Workmen's Compensation,* 21 HASTINGS L.J. 609 (1970).
16. The employer takes the worker with all his preexisting conditions and predispositions as he comes to the job. LARSON, *supra* note 2, at vol. 1, § 12.00 and vol. 2, § 59.00 (1973). Iowa's recognition of this concept is seen in Barz v. Oler, 257 Iowa 508, 133 N.W. 2d 704 (1965), where recovery was allowed for death caused by a ruptured aneurysm which was shown to have resulted when strenuous activity aggravated a preexisting condition, and in Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968), where recovery was allowed for a preexisting emotional disturbance. Representative of cases allowing compensation for a preexisting mental disorder is Wade Lahar Construction Co. v. Howell, 376 P.2d 221 (Okla. 1962). Claimant who was buried alive in a ditch cave-in suffered physical injuries, shock and posttraumatic neurosis which aggravated a latent personality defect.
17. Note, *Workmen's Compensation Awards for Psychoneurotic Reactions,* 70 YALE L.J. 1129, 1132-33 (1961).
18. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 568, —, 343 N.E.3d 913 (1976). Iowa's recognition of the remedial nature of workmen's compensation and of the liberal construction to which the statutes are entitled is found in Crowe v. De Soto Consolidated School District, 246 Iowa 402, 68 N.W.2d 63 (1955).
19. ILL. ANN. STAT. ch. 48, § 138.1 et seq. (Smith-Hurd 1969).
20. Only six states, including Iowa, do not require that an injury occur by accident. Others are California, Massachusetts, Minnesota, Rhode Island, and Texas. Interestingly, Texas was one of the first jurisdictions to grant compensation for a mental injury resulting from a mental stimulus in Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955). The phrase, "accidental injury," which is used by the Illinois act, is also found in the statutes of Alaska, Arkansas, Conecticut, Maryland, Mississippi, New York, Oklahoma and Oregon. Ohio, Michigan, Montana, Washington, West Virginia, and Wyoming have their own distinctive wording, but all encompass the concept of injury by accident. The remaining jurisdictions use the words "by accident."

Iowa's concept of injury is seen in the often cited case of Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 732, 254 N.W. 35, 39 (1934). In that case, the Supreme Court of Iowa defined personal injury as "an injury to the body, the impairment of health, [mental injury fits here] or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic [sudden stimulus] or other hurt [cumulative stress] or damage to the health or body of an employee." The stimulus is one that "acts extraneously to the natural process of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body." The use of "damage to the health or body" seems to exclude the possibility of awards being made for physical injury only.
21. Forty-two states use the phrase "arising out of and in the course of employment."

of employment.[22] The factual situation in *Pathfinder*, however, is less typical in that an accidental *mental* injury is produced by a *mental* stimulus.

A useful tool in evaluating cases in this area is to apply the approach suggested by Professor Larson, author of a well-known treatise on workmen's compensation, of classifying stimuli and injuries as either physical or mental.[23] A physical stimulus followed by a physical injury is compensable.[24] The second classification in which compensation is also routinely awarded is when a mental stimulus causes a physical injury.[25] In this classification the stimulus is frequently of sudden onset such as an unexpected noise or flash of light,[26] or extreme fright, or emotional distress[27]—although the same result may be reached in a case of protracted anxiety or pressure.[28] The injury is a physical manifestation, *e.g.*, heart attack,[29] stroke,[30] or paralysis.[31] A third classification is that of a physical stimulus causing a mental injury. The physical stimuli might range from a back injury[32] to a blow to the body[33] to serum sickness.[34] The mental effect could variously be termed traumatic neurosis[35] or conversion hysteria.[36] In this category, too, compensation is almost uniformly awarded.

LARSON, *supra* note 2, at vol. 1, § 6.00 (1973). *See* for Iowa's position, Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 853, 124 N.W.2d 548, 551 (1963). The statutes of North Dakota, Pennsylvania, Texas, Washington, and Wisconsin omit "arising out of." The statutes of West Virginia and Wyoming have other variations. The Utah statute uses "or" in place of the conjunctive "and."

22. "An injury is said to arise in the course of the employment . . . , at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto." LARSON, *supra* note 2, at vol. 1, § 14.00 (1973).

23. *Id.* at vol. 1A, § 42.20.

24. Stull v. Keller, 11 Ohio Misc. 45, 228 N.E.2d 682 (Ct. C.P. Stark County 1967).

25. Two possible grounds for denying compensation are: (1) when the emotional stimulus is one normally encountered in everyday life, Whiting-Turner Contracting Co. v. McLaughlin, 71 Md. App. 360, 274 A.2d 390 (Ct. Special App. 1971) (claimant denied compensation because argument with foreman was not extraordinary); or (2) where there is inadequate evidence of a causal connection between the mental stimulus and the physical injury, Campbell v. Colgate-Palmolive Co., 134 Ind. App. 45, 184 N.E.2d 160 (Ct. App. 1962) (conflicting medical testimony regarding an emotional upset failed to establish a causal connection).

26. *See, e.g.*, Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947) (lightning).

27. Pukaluk v. Insurance Co. of N. Am., 7 A.D.2d 676, 179 N.Y.S.2d 173 (App. Div. 1958).

28. Egan's Case, 331 Mass. 11, 116 N.E.2d 844 (1954).

29. Little v. J. Korber & Co., 71 N.M. 294, 378 P.2d 119 (1963).

30. Tracy v. Americana Hotel, 234 So.2d 641 (Fla. 1970).

31. Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947) (lightning).

32. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731 (Iowa 1968).

33. Olin Indus. Inc. v. Industrial Comm'n, 394 Ill. 202, 68 N.W.2d 259 (1946).

34. City of Austin v. Crooks, 343 S.W.2d 272 (Tex. Civ. App. 1961).

35. Hartman v. Cold Spring Granite Co., 243 Minn. 264, 67 N.W.2d 656 (1954).

36. Glazier v. State Accident Ins. Fund, 516 P.2d 757 (Ore. Ct. App. 1973). Other terms appearing in the cases include conversion reaction, traumatic psychoneurosis, residual psychic disability, hysterical neurosis, chronic schizophrenic condition, depressive reaction neurosis, and fear complex. Common symptoms according to Keiser, in *Traumatic Neurosis; A Common Problem Relatively Untried in the Courts*, 17 MED. TRIAL TECH. Q. 1, 3 (1970), are dizziness, blackouts, insomnia, irritability, hysteria, anxiety, depression, startle reactions, sweating, palpitation, fatigue, decrease in sexual drive, decrease in appetite, changes in sleeping patterns, changes in personality patterns, nightmares or repetitive dreams of the accident, exaggerated ideas and behavior, and other manifestation of fearfulness and incapacitation. The body is unprepared to meet the stimuli which flood the psychic aparatus "in such great quantities that the mind cannot bind and bring the stimuli

Pathfinder presents the less frequent situation in which a mental stimulus (emotional reaction to finding the severed hand) causes a mental injury (residual anxiety).[37] The stimuli in this grouping may be similar to those in the mental stimulus-physical injury class, that is, sudden fright[38] or cumulative stress.[39] Courts denying compensation for a mental injury resulting from a mental stimulus have based their decisions on a finding of no accident[40] or lack of a physical injury.[41] In *Pathfinder*, the Illinois court interpreted the Illinois statute[42] to mean ". . . that an employee who, like the claimant here, suffers a sudden,[43] severe emotional shock traceable to a definite time, place and cause[44] which causes psychological injury or harm *has suffered an accident*[45] within the meaning of the Act, though no physical trauma or injury was sustained."[46]

Although it would be correct to think of the mental stimulus-mental injury line of cases as a developing area of the law, an English workmen's compensation case, *Yates v. South Kirby Collieries, Ltd.*,[47] almost seventy years ago foreshadowed what appears to be a trend toward awarding compensation. *Yates* and *Pathfinder* are factually similar in that *Yates* also involved an employee—a coal miner—going to the aid of his fellow employee following an accident in the mine where they were working. The collier who carried his mortally injured co-worker to the surface tried to return to his underground work but was unable to do so. The initial proceeding awarding compensation resulted in a find-

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under manageable control. All of the individual's mental energy is concentrated upon mastering these stimuli and the individual withdraws from other thoughts and activities until the stimuli are brought under psychic control and a mental equilibrium is returned," thus ending the neurosis. Manson, *Workmen's Compensation and the Disability Neurosis*, 11 BUFFALO L. REV. 376, 378 (1962).

37. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 568, 343 N.E.2d 913 (1976).

38. *E.g.*, Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955).

39. *E.g.*, Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960). Claimant went to work on an assembly line. Because he was unable to keep up the required pace, his foreman and his co-workers complained. When the claimant collapsed after thirteen days, his condition was disgnosed as paranoid schizophrenia. Rejecting the argument that a single stimulus which can be denominated the cause of a mental disability is necessary, the Supreme Court of Michigan affirmed the award of compensation because medical experts had established a causal link between the cumulative stress and the paranoid schizophrenia.

40. *E.g.*, Brady v. Royal Mfg. Co., 117 Ga. App. 312, 160 S.E.2d 424 (Ct. App. 1968).

41. *E.g.*, Jacobs v. Goodyear Tire & Rubber Co., 196 Kan. 613, 412 P.2d 986 (1966); Hackett v. Travelers Ins. Co., 195 So. 2d 758 (La. Ct. App. 1967). These cases might be compared with tort cases under the impact rule. *See generally* W. PROSSER, THE LAW OF TORTS § 54 (4th Ed. 1971).

42. ILL. ANN. STAT. ch. 48 § 138.1 et. seq. (Smith-Hurd 1969).

43. The court's use of the word "sudden" here may indicate that it is limiting its decision to make cases of cumulative stress non-compensable.

44. The concept of time-definiteness applied to cause may be applied to either cause or result. When definitiveness is present in both the cause and result a typical industrial accident would occur. If, on the other hand, both elements are missing a typical occupational disease is likely. LARSON, *supra* note 2, at § 37.20 (1973).

45. "The basic and indispensible ingredient of 'accident' is unexpectedness." *Id.* at 703.

46. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 568, ___, 343 N.E.2d 913, 917 (1976) (emphasis added).

47. [1910] 2 K.B. 538.

ing that the miner had a "genuine incapacity to work which was due to nervous shock."[48] This finding was upheld on appeal.[49]

The first important American case was handed down thirty years after *Yates*. In *Burlington Mills Corp. v. Hagood*,[50] the mental stimulus was sudden fright induced by an arc of electricity from a motor with a short circuit. As the claimant started to faint, she was caught by a fellow employee. Upon seeing her co-worker at a later time, she again fainted. She was awarded compensation for the resultant neurosis which made it impossible for her to return to work.

Fourteen years later, what Professor Larson has termed "[p]robably the most significant case yet to appear on the subject of 'nervous' injury," *Bailey v. American General Insurance Co.*,[51] was decided.[52] In that case, claimant, a structural steel worker, had witnessed the death of another employee. The men were sharing a high scaffold which broke causing one to fall to his death. The claimant expected to fall, but was entangled in a cable. Following this experience, the claimant was no longer able to work at his job. The issue before the court was whether the claimant whose injuries were mental had suffered a compensable injury under the Texas statute which required "damage or harm to the physical structure of the body."[53] In holding that the claimant's injury came within this requirement, the court emphasized the totality of the individual and the interdependence of the body's systems.[54] A later opinion of the Georgia Court of Appeals expresses the same interrelationships recognized by the Texas Supreme Court in *Bailey*:

> The human body consists of bones, flesh, ligaments and nerves, controlled by the brain. The law [workmen's compensation] does not state which of these particular elements must produce the disability. If a disability exists, whether or not it is psychic or mental, if it is real and is brought on by the accident and injury, this being a humane law and liberally construed, it is nevertheless compensable.[55]

Awards for mental disability resulting from a mental stimulus have not gone uncriticized. One of the best articulations of possible criticisms which might be leveled against the *Pathfinder* view is found in the dissenting opinion in *Deziel v. Difco Laboratories, Inc.*,[56] an interesting trilogy of mental stimulus-

48. *Id.*
49. *Id.*
50. 177 Va. 204, 13 S.E.2d 291 (1941).
51. 154 Tex. 430, 279 S.W.2d 315 (1955).
52. LARSON, *supra* note 2, at 7-377 (1973).
53. TEX. REV. CIV. STAT. ANN. art. 8309 (Vernon 1941).
54. Bailey v. American Gen. Ins. Co., 154 Tex. 430, ___, 279 S.W.2d 315, 318 (1955).
55. Indemnity Ins. Co. of N. Am. v. Loftis, 103 Ga. App. 749, ___, 120 S.E.2d 655, 656 (Ga. Ct. App. 1961). A discussion of disability is found in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1120, 125 N.W.2d 251, 256 (1963). The Iowa Supreme Court stated that "the kind of disability with which the Compensation Act is concerned is industrial, not functional, disability. It is disability which reduces earning capacity, not merely bodily functions. Functional disability is an element to be considered in determining the reduction of earning capacity but it is not the final criterion."
56. 394 Mich. 839, 232 N.W.2d 146 (1975) (dissenting opinion).

mental injury cases. These criticisms include: overburdening the courts with many suits, both "real and contrived"; failing to deal adequately with the problems of causation; and requiring employers, who will pass the ultimate cost along to the consumer, to pay for psychological screening and "to accept financial responsibility for the lifetime of an employee . . . who has no real 'injury' but needs to blame something on somebody for personal problems."[57]

Almost invariably, when courts grant relief in an area where none was previously allowed, critics claim that the courts will be beseiged with claims. The *Pathfinder* court specifically addressed this attack by pointing out that there was no evidence that such claims had increased in other states taking its position.[58]

The court in *Pathfinder* also attempted to allay fears that some of the many petitions for relief would be spurious by charging the Industrial Commission with the need "to be vigilant in the assessment of claims which might be easily fabricated or exaggerated."[59] The Arizona Court of Appeals, in *Shope v. Industrial Commission*,[60] forestalled any increase in litigation inflated by false claims by refusing to grant compensation to a shop foreman who had an argument with a customer and alleged a resulting mental injury, and said that granting a monetary award "would literally open Pandora's box permitting compensation to any disgruntled employee who leaves his job in a huff because of an emotional distrubance."[61]

Determination of the reality of the disability in any given case of mental injury is complicated by conflicting expert testimony and a subjective standard applied to the claimant by workmen's compensation statutes. These conflicts may be seen in *Pathfinder*. At the hearing before the Industrial Commission, a specialist in neurology and psychiatry testified that he could find "no objective evidence of any organic disease."[62] At the appeal before the circuit court, there was expert testimony for both sides with Ms. Rosa's expert concluding that she suffered from peripheral neuritis and residual anxiety with the latter arising from the accident. He admitted that his diagnosis was a subjective one based upon what the claimant had told him.[63] The opposing expert believed that the claimant was suffering from peripheral neuropathy and that her complaints of numbness were fictitious.[64] Thus, it can be seen that conflicting opinion as to the reality of the injury can often be expected.

Although expert testimony is not necessary in all workmen's compensation cases,[65] it is needed in cases of emotional injury, not only to establish the reality,

57. Deziel v. Difco Laboratories, Inc., 394 Mich. 839, ___, 232 N.W.2d 146, 153-54 (1975).
58. Pathfinder Co. v. Indus. Comm'n, 62 Ill. 3d 568, —, 343 N.E.2d 913, 919 (1976).
59. *Id.*
60. 17 Ariz. App. 23, 495 P.2d 148 (Ct. App. 1972).
61. Shope v. Industrial Comm'n, 17 Ariz. App. 23, ___, 495 P.2d 148, 150 (Ct. App. 1972).
62. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 568, ___, 343 N.E.2d 913, 916 (1976).
63. *Id.* at ___, 343 N.E.2d at 915.
64. *Id.* at ___, 343 N.E.2d at 916-17.
65. See LARSON, *supra* note 2, at vol. 3, § 79.50 et seq.

severity, duration and extent of the injury, but also to establish the cause of the injury.[66] As has been pointed out, workmen's compensation abandons proximate cause found in tort law and compensates injury arising out of and in the course of employment. One expert testifying in *Pathfinder* in response to a hypothetical question, stated that there was no causal connection between the accident and the complaints of claimant.[67] Another expert theorized that Ms. Rosa's health problems were caused by a drug she was taking to control tuberculosis.[68] Ms. Rosa's expert concluded that the injuries arose from the accident and the court seemingly agreed.[69] Again, conflicting testimony is likely on the issue of causation.

The Michigan Supreme Court in *Deziel* ignored traditional tests of causality and adopted a more easily satisfied three-part test developed from Professor Larson's treatise.[70] The questions which the majority of the *Deizel* court found needed to be answered affirmatively were: "1) Is the claimant disabled? 2) If so, is the claimant disabled on account of some 'personal injury'? 3) Did the claimant's employment aggravate, accelerate, or combine with some internal weakness or disease to produce the personal injury?"[71] Authorities have suggested that applying this type of test enables the courts to avoid a battle of the experts over causality and throws "the difficult burden of proof on the employer to demonstrate that some job-related situation did *not* contribute to or aggravate the employee's maladjustment."[72]

One of the underlying philosophies of workmen's compensation is to encourage the employer to remove risks from the employment situation. Because of the subjective standard applied and because of the difficulty in determining which stimuli will produce mental injury in a worker, some experts in industrial psychology see decreasing the risk of emotional injury to every worker as nearly impossible.[73] It is suggested the equal injury or illness in two individuals may produce different results because of varying social, spiritual and psychological factors.[74] Thus, it has been said:

> [W]hat would be a traumatic experience to one individual may be another's daily fare. The inherited constitution of the individual, his early experiences and modes of reacting to them, will be determinative of whether a particular experience has a traumatic effect upon the mental life or is assimulated with little effort.[75]

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66. Note, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1133 (1961).
67. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 568, ___, 343 N.E.2d 913, 916 (1976).
68. *Id.* at ___, 343 N.E.2d at 915.
69. *Id.*
70. Deziel v. Difco Laboratories, Inc., 394 Mich. 839, —, 232 N.W.2d 146, 150 (1975).
71. *Id.*
72. H. TRICE & J. BELASCO, EMOTIONAL HEALTH AND EMPLOYER RESPONSIBILITY 9 (N.Y. St. School of Indus. and Labor Realtions No. 57, 1966) [hereinafter cited as TRICE].
73. *Id.* at 6-11.
74. Miller & Fellner, *Compensable Injuries and Accompanying Neurosis: The Problem of Continuing Incapacity Despite Medical Recovery*, 1968 WIS. L. REV. 184, 185.
75. Manson, *Workmen's Compensation and the Disability Neurosis*, 11 BUFFALO L. REV. 376, 379 (1962).

The risks to the employee in the employment situation may be divided into those which are inherent in the job itself and those which arise from the organization of the business—"performance appraisal and 'work addiction'; status changes, such as promotion and demotion; and organizational change."[76] Therefore, instead of looking at an individual's intellectual or physical capabilities only, the employer may be compelled to examine the employee's social and emotional capabilities as well.

Psychological screening is an expensive undertaking and may not provide altogether satisfactory results.[77] Psychological tests require interpretations by clinical psychologists whose salaries would be burdensome to small business and whose opinions as to the interpretation of a given test could vary widely. However, as a practical matter, the employer might be able to foster a healthy mental attitude in his employees by using careful hiring practices and by supplying the type of work environment conducive to employee well-being.[78] In view of the preponderance of predisposition to mental illness found in the cases,[79] it is difficult to say that any preventive measure the employer could take would be effective in reducing the risk of mental injury. Furthermore, all of the costs involved will filter down to the consumer.

Notwithstanding these criticisms, the judicial trend seems to be toward awarding compensation for mental injuries resulting from mental stimuli. One justification is found in the argument that mental and physical injuries should not be differentiated. A second is found in the underlying philosophy of workmen's compensation.

Abandoning the "artificial and medically unjustifiable"[80] dichotomy between mental and physical injury is a step actively espoused by Professor Larson who suggests that the only question to be asked is "whether there was a harmful change in the human organism . . . ."[81] Proponents defend abolition of the distinction by pointing to the progress in medical science.[82] They also see retention of the dichotomy to prevent spurious claims as being invalid because it is equally as possible to feign a back injury or a whiplash as to simulate an emotional disability.[83]

Several courts have found no logical basis for maintaining a separation. The Arizona Court of Appeals, in *Brock v. Industrial Commission*,[84] found no reason for viewing differently the direct physical injury suffered by the victim—

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76. TRICE, *supra* note 72, at 30-31.
77. Deziel v. Difco Laboratories, Inc., 394 Mich. 839, ___, 232 N.W.2d 146, 154 (1975) (dissenting opinion).
78. TRICE, *supra* note 72, at 34-39.
79. Stull v. Keller, 11 Ohio Misc. 45, 228 N.W.2d 682 (Ct. C.P. Stark County 1967).
80. Larson, *Mental and Nervous Injury in Workmen's Compensation*, 23 VAND. L. REV. 1243, 1260 (1970).
81. *Id.*
82. LARSON, *supra* note 2, at 7-378.
83. Note, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1131 (1961).
84. 15 Ariz. App. 95, —, 486 P.2d 207, 208 (1971).

a woman hit by a truck—from the mental injury experienced by the driver of the truck. A very recent decision advocating abolishing the distinction between mental and phyical injury appears in *Wolfe v. Sebley, Lindsay, & Curr. Co.*[85] In awarding compensation to a secretary who found her boss dead from a self-inflicted bullet wound in the head, the Court of Appeals of New York saw "nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. The determinative factor is the particular vulnerability of an individual by virtue of his physical makeup."[86] The court went on to suggest that if the claimant had suffered a heart attack instead of a psychological injury there would have been scant question that compensation would be awarded.[87]

Similarly, the *Pathfinder* court found little to support the awarding of compensation to a claimant who suffers psychological disability from a minor physical injury while denying compensation to a claimant who has a similar psychological problem but no physical injury. Looking to their own jurisdiction, the court cited *Marshall Field & Co. v. Industrial Commission*[88] in which the claimant injured a thumb when she slipped and fell. Later, she was shown to be suffering from major hysteria and was awarded total disability for her psychological injury.

The *Wolfe* court, too, found "nothing talismanic about physical impact"[89] and said that "having recognized the reliability of identifying psychic trauma as a causative factor of injury in some cases and the reliability of identifying psychological injury as a resultant factor in other cases, . . . [there was] no reason for limiting recovery in the latter instance to cases involving physical impact."[90]

The second justification for compensating the emotionally injured employee is found in the basic philosophy of workmen's compensation. As has been previously mentioned, compensation laws create new rights and remedies and supplant the common law.[91] Unlike the adversarial contest found in tort litigation which seeks to right a wrong between two parties, workmen's compensation is a plan to provide security to an injured worker.[92] Compensation is society's weighing of the value of the worker's work against the cost to it to indemnify that worker when he is injured. If compensation is not allowed, the employee in the mental injury case may have no remedy against an employer subject to the act.[93]

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85. 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975).
86. Wolfe v. Sebley, Lindsay & Curr Co., 36 N.Y.2d 505, 510, 330 N.E.2d 603, 606, 369 N.Y.S.2d 637, 641 (1975).
87. *Id.*
88. 305 Ill. 134, 137 N.E. 121 (1922).
89. 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).
90. *Id.*
91. Sheen v. Di Bella, 395 S.W.2d 296, 298 (Mo. Ct. App. 1965).
92. LARSON, *supra* note 2, at vol. 1, § 2.70 (1973).
93. Bailey v. American Gen. Ins. Co., 154 Tex. 430, ___, 279 S.W.2d 315, 322 (1955).

Inherent in the latin root of compensate, *compensare*, is the concept of weighing the verifiable against that which cannot be verified objectively. The dissent in *School District No. 1 v. Department of Industrial, Health and Labor Relations*,[94] a mental injury case in which the majority denied compensation, suggests a weighing process with protection of the employees who have suffered mental harm out balancing the harm to employers and insurance carriers as a result of pretended psychological disabilities.[95]

Although there has been an increase in the number of jurisdictions accepting the *Pathfinder* position and there is discernible increase in the speed with which the position has been accepted, a mighty river has not yet formed.[96] If the prophesied flood of litigation should occur and if it should be fed by torrents of ingenuous claims, whether or not the growing trend toward awarding compensation in cases of mental stimulus causing mental injury would be dammed remains to be seen.

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94. 62 Wis. 2d 370, 215 N.W.2d 373 (1974).

95. School Dist. No. 1 v. Department of Indus., Health and Labor Relations, 62 Wis. 2d 370, 215 N.W.2d 373 (1974).

96. In 1910 England stood alone. Since 1967, Oregon, California, Missouri, New York and Illinois have adopted the English position from Yates v. South Kirby Collieries, Ltd., [1910] 23 K.B. 538. Undoubtedly there are other jurisdictions which would award compensation if a proper case should come before them.