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THE NEW INDUSTRIAL ACCIDENT CRISIS: COMPENSATING WORKERS FOR INJURIES IN THE OFFICE

*Rachel M. Janutis**

The legal system has historically afforded inferior remedies for emotional injuries than it has for physical injuries. This bias against psychological injuries is prevalent in the area of workers' compensation, where most state statutes allow workers to receive compensation for work-related physical injuries but not purely emotional or mental injuries. This Article discusses and ultimately argues that states should extend workers' compensation coverage to emotional injuries. The argument for such an extension of workers' compensation coverage is based on many factors, most notably the prevalence of workplace stress and its effect on workers' health, well-being, and productivity, as well as the inapplicability of the "physical impact rule" in the context of workers' compensation claims for psychological injuries.

The law frequently treats claims that seek compensation for purely emotional distress or mental injuries differently than claims that seek compensation for physical injuries. Indeed, the law frequently demonstrates a seeming hostility toward compensation for purely mental or emotional injuries.[1] In this Article, I highlight one area where this hostility arises. A significant minority of states continue to exclude from workers' compensation coverage claims for

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1. For example, all jurisdictions have long recognized claims for damages to compensate for physical injuries arising out of another's negligence, and all states permit plaintiffs to recover damages for "parasitic emotional distress"—emotional distress that results from negligently inflicted bodily injury. *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 363 (5th ed. 1984) [hereinafter "PROSSER AND KEETON ON TORTS"]; John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 789 (2007). However, claims for negligent infliction of emotional distress have only recently gained acceptance, with courts placing additional limits on recovery for purely emotional distress.

psychological injuries arising out of and in the course of employment.

The treatment of compensation for mental injuries in this area is particularly noteworthy for two reasons. First, it highlights the dissonance between the legal conception of the connection between mental health and workplace productivity and the conception of this connection in other social sciences. The hostile treatment of these claims within the law discounts the role that mental health and acumen play in the modern workplace. At the same time, a growing body of social science research seeks to demonstrate and quantify the impact of mental disorders on work productivity. This discord is problematic when one considers the increasing prevalence of workplace stress and injuries resulting from workplace stress.

Second, employer liability for workers' compensation claims is significantly more limited than what liability for emotional distress damages would be in traditional tort law claims. General noneconomic damages such as those for pain and suffering are not awarded through the workers' compensation system. Instead, workers' compensation awards compensate for economic losses such as lost wages and expenses for medical and rehabilitation treatment only. Awards are only available upon a showing of partial or total vocational impairment. Thus, claims for workers' compensation benefits for purely emotional or mental injuries are not susceptible to some of the usual concerns raised over such claims in other areas. In this way, the law's continued hostility to these claims highlights the public perceptions about and biases against these types of injuries.

In Part I, this Article will begin by giving a few illustrations of the societal bias against mental injuries and the disparate treatment of victims of such injury and illness. It will also explore various studies on the prevalence of workplace stress, its effect on health and well-being, and the costs of mental illness and disorders caused by workplace stress. Part II will first give a quick overview of workers' compensation, followed by a history of workers' compensation, beginning with the common law system of freedom of contract and the subsequent shift to risk allocation when strict liability replaced the common law fault-based system. Finally, Part II will analyze the different state requirements for affording coverage for psychological injuries. Part III provides an analysis of the physical impact rule as a design to limit the scope of claimants for whose injuries employers

are liable, as well as a way to quash concerns about the ability to fabricate mental injury claims. Finally, Part IV explores why states have been reluctant to apply the risk allocation principle of workers' compensation to psychological injuries.

I. TWO PORTRAITS OF THE HAZARDS OF WORKPLACE STRESS

Two contrasting accounts of the hazards of workplace stress shed light on the potential hazards that office workers face and public perceptions and biases about those hazards.

A. Safety Training in the Office

In one episode of the popular television comedy *The Office*, the warehouse workers at the fictional Dunder Mifflin Paper Company are required to attend a mandatory safety training conducted by Darryl, one of the warehouse workers.[2] Regional manager and boss of the office, Michael Scott, decides to require office workers to attend the training as well. During the safety training, Darryl explains the perilous hazards of using the heavy machinery in the warehouse improperly, noting the risk of serious physical injury. After a confrontation between Darryl and Michael regarding the proper way to avoid these serious injuries, Michael mandates that all workers—office and warehouse—attend a mandatory office safety training session. Hilarity ensues as Michael attempts to dramatize the seemingly innocuous risks of office work, including repetitive stress injuries and depression. At one point in the office training session, Darryl orders the warehouse workers to walk out of the office training and angrily accuses Michael of living a "nerfy" life and always sitting on his "biscuit," instead of doing actual work. Michael then attempts to dramatize the risk of depression by threatening to jump off the office roof. Ultimately, Darryl heroically saves the day by insincerely convincing Michael that he is a "Braveheart" and that Darryl "could not do what you do."[3] Such a portrayal comports with popular notions about the relative risks and health consequences of stress and mental illness as opposed to physical labor and physical injury.

2. *The Office: Safety Training* (NBC television broadcast Apr. 12, 2007).

3. *Id.*

B. McCrone v. Bank One Corp.[4]

In contrast, Kimberly McCrone's real-life exposure to health risks from office employment paints a much different picture. On August 4, 2001, Kimberly McCrone was working as a teller at a Bank One branch in Canton, Ohio, when she was robbed at gunpoint.[5] After the robbery, she was diagnosed with post-traumatic stress disorder ("PTSD") and was unable to return to the bank.[6] After being diagnosed with PTSD, McCrone applied to receive workers' compensation benefits. As Justice Resnick of the Ohio Supreme Court would later observe, McCrone's "injury [was] real and disabling, and its existence [was] supported by competent medical evidence. It [was] work-related in every sense of the word, it was accidental in character and result, and it has prevented [McCrone] from returning to her former position of employment."[7] Nonetheless, the Ohio Bureau of Workers' Compensation denied McCrone's application for benefits because McCrone's injuries were purely psychological, and the Ohio Workers' Compensation Act excludes purely psychological or psychiatric injuries from the definition of covered injuries.[8] As Justice Pfeifer of the Ohio Supreme Court noted, if McCrone had suffered so much as a paper cut during the course of the robbery, she would have been entitled to workers' compensation benefits for all of her injuries, including the PTSD, because the Act provides coverage for all injuries—psychological and physical—as long as an employee suffers a physical injury.[9]

McCrone challenged the Ohio Workers' Compensation Act, arguing that the exclusion of purely psychological injuries violated the Equal Protection Clauses of the Ohio and United States Constitutions.[10] The Ohio Supreme Court ultimately rejected her claim.[11] In so doing, the court noted that because her injuries were not covered by the Act, McCrone was not precluded from pursuing a

4. 107 Ohio St. 3d 272, 2005 Ohio 6505, 839 N.E.2d 1.
5. *Id.* ¶ 2.
6. *Id.*
7. *Id.* ¶ 43 (Resnick, J., dissenting).
8. *Id.* ¶ 2 (majority opinion).
9. *See id.* ¶ 55 (Pfeifer, J., dissenting).
10. *Id.* ¶ 2 (majority opinion).
11. *Id.* ¶ 38.

common law claim for damages against her employer.[12] However, as Justice Pfeifer also noted in his dissent, the availability of a common law claim afforded McCrone only hollow protection.[13] McCrone's claim for negligence against her employer likely would be precluded under the intervening cause doctrine, and hence, McCrone was likely to go without compensation for her injuries.[14]

Countless other examples illustrate the societal biases against mental injuries and illness and the disparate treatment of victims of such injuries and illness. For example, recent news accounts have highlighted the plight of returning Iraq war veterans seeking accurate diagnosis and adequate treatment of their stress-related injuries such as PTSD.[15] These societal prejudices against mental illness and injury manifest themselves in the law's continued hostility to claims seeking compensation for these types of injuries.

C. The Relationship Between Stress and Workplace Productivity

Unfortunately, McCrone's experience more accurately reflects realities about the prevalence of workplace stress and the effect that workplace stress can have on health and well-being. Studies of American workers reveal that stress is a reality of the American workplace. The National Institute for Occupational Safety and Health ("NIOSH") has reported the results of several studies pertaining to stress in the workplace.[16] Between 25 percent and 40 percent of the workers surveyed in these studies report feeling very

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12. *Id.* ¶ 33 n.5.

13. *See id.* ¶ 53 (Pfeifer, J., dissenting).

14. *See id.*

15. For example, National Public Radio correspondent Daniel Zwerdling filed a series of stories detailing allegations of discriminatory treatment against soldiers who sought treatment for mental illness at one military base. *See, e.g.*, Daniel Zwerdling, *Military Wives Fight Army to Help Husbands*, NAT'L PUB. RADIO, May 16, 2008, http://www.npr.org/templates/story/story.php?storyId=90378222; Daniel Zwerdling, *Soldiers Say Army Ignores, Punishes Mental Anguish*, NAT'L PUB. RADIO, Dec. 4, 2006, http://www.npr.org/templates/story/story.php?storyId=6576505; *see also* Julian E. Barnes, *Veterans Struggle with War Trauma*, L.A. TIMES, Apr. 18, 2008, at A16; William M. Welch, *Trauma of Iraq War Haunting Thousands Returning Home*, USA TODAY, Feb. 28, 2005, at 1A (noting that six out of ten soldiers surveyed reported concerns of discriminatory or hostile treatment if they acknowledged mental health problems).

16. NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, PUBLICATION NO. 99–101, STRESS . . . AT WORK [hereinafter STRESS . . . AT WORK].

or extremely stressed at work.[17] This same publication cites studies reporting that one-quarter of employees view their jobs as the top source of stress in their lives, that three-quarters of employees believe that work is more stressful than it was a generation ago, and that workers more strongly associate problems at work with health complaints than they do with any other life stressor, including financial problems and family problems.[18]

Moreover, unlike the lighthearted portrayal of the consequences of exposure to workplace stress portrayed in *The Office* episode detailed above, NIOSH has recognized that exposure to workplace stress has been linked to several types of physical ailments and chronic health problems, including mood and sleep disturbances, headaches, cardiovascular disease, and psychological disorders.[19] NIOSH cites studies finding that health care expenditures are nearly 50 percent greater for workers who report high levels of stress.[20] NIOSH notes that these health consequences translate into increased rates of absenteeism, tardiness, and unemployment—all of which contribute to decreased productivity.[21]

More importantly, recent social science research has sought to chronicle the effect of exposure to workplace stress on mental and physical health. Additional social science research has sought to quantify the cost of health consequences frequently linked to workplace stress, including the cost to workplace productivity. For example, work by Professor Michael Frese and other researchers has concluded that workplace stress has a negative impact on mental and physical health.[22] Frese has concluded that a significant correlation exists between psychological stress and psychosomatic complaints that cannot be explained by study methodology or individual variables such as income, age, or financial security.[23]

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17. *Id.* at 4.

18. *Id.* at 5.

19. *Id.* at 10.

20. *Id.*

21. *Id.* at 12.

22. Michael Frese, *Stress at Work and Psychosomatic Complaints: A Causal Interpretation*, 70 J. APPLIED PSYCHOL. 314, 326–27 (1985); *see also* James S. House, Victor Strecher, Helen Metzner & Cynthia A. Robbins, *Occupational Stress and Health Among Men and Women in the Tecumseh Community Health Study*, 27 J. HEALTH & SOC. BEHAV. 62 (1986); Debra J. Lerner, Sol Levine, Sue Malspeis & Ralph B. D'Agostino, *Job Strain and Health-Related Quality of Life in a National Sample*, 84 AMER. J. PUB. HEALTH 1580 (1994).

23. Frese, *supra* note 22, at 326–27.

Other research has quantified the costs of mental illness and disorders frequently linked with exposure to workplace stress. For example, one study estimated the annual cost of anxiety disorders such as the PTSD that McCrone suffered to be $42.3 billion in 1990 in the United States alone.[24] The researchers concluded that $4.1 billion, or 10 percent of these costs, was attributable to indirect workplace costs, including excess absenteeism and reductions in at-work productivity.[25] Another study concluded that the costs for anxiety disorders in the United States in 1990 was $46.6 billion, with over 75 percent of these costs attributable to lost or reduced workplace productivity.[26] Another study estimated the annual lost-productivity costs due to depression account for 55 percent of the total costs associated with the depression.[27] The study estimated the costs of excess absenteeism from depression to be about $11.7 billion annually, while the costs of reductions in at-work productivity were about $12.1 billion annually.[28] While not all anxiety disorders and depression can be linked to workplace stress, the large costs associated with anxiety disorders and depression suggest that even that portion of these costs that can be linked to workplace stress would be significant.

II. WORKERS' COMPENSATION

A. An Overview of Workers' Compensation

Workers' compensation is a statutorily created administrative scheme designed to provide compensation to victims who suffer injuries in the course of employment.[29] A workers' compensation system is designed to displace the common law tort system.[30] Under

24. *See* Paul E. Greenberg, Tamar Sisitsky, Ronald C. Kessler, Stan N. Finkelstein, Ernst R. Berndt, Jonathan R.T. Davidson, James C. Ballenger & Abby J. Fryer, *The Economic Burden of Anxiety Disorders in the 1990s*, 60 J. CLINICAL PSYCHIATRY 427, 427 (1999).

25. *Id.*

26. Robert L. DuPont, Dorothy P. Rice, Leonard S. Miller, Sarah S. Shiraki, Clayton R. Rowland & Henrick J. Harwood, *Economic Costs of Anxiety Disorders*, 2 ANXIETY 167, 167 (1996).

27. *See* Paul E. Greenberg, Laura E. Stiglin, Stan N. Finkelstein & Ernst R. Berndt, *The Economic Burden of Depression in 1990*, 54 J. CLINICAL PSYCHIATRY 405, 411 (1993).

28. *Id.* at 411.

29. *See* MARGARET C. JASPER, WORKERS' COMPENSATION LAW 1–2 (Oceana Publ'ns 1997).

30. *Id.* at 1.

the typical workers' compensation system, injured workers receive benefits intended to compensate the workers for lost wages and the cost of medical treatment as a result of their injuries.[31] Injured workers become entitled to compensation whenever they suffer an injury arising out of the course of their employment regardless of the allocation of fault among employee, fellow workers, and employer for the accident, and regardless of the absence of negligence on the part of the employer in the accident.[32] Benefits for certain types of injuries are determined pursuant to a preset schedule[33] and, for all injuries, are usually more modest than the compensatory damages that would be available under the common law tort system.[34] However, administrative proceedings to recover benefits are more relaxed than full-scale litigation and are designed to be speedier and less expensive than litigation.[35]

Employers bear the cost of workers' compensation. Under most state systems, employers are required to secure their potential liability through private insurers or demonstrate adequate assurances of self-coverage.[36] Some states provide state-funded insurance coverage.[37] While employers become liable for benefits regardless of fault, employers are protected from common law tort liability for workplace accidents.[38] Thus, workers' compensation represents a quid pro quo exchange between employers and employees. Employees receive the certainty of automatic benefits, while employers receive smaller liability in the form of reduced benefits and protection from common law liability.

A couple of limiting principles govern workers' compensation schemes. First, employers are liable for injuries to employees only

31. *Id.* at 17–19.

32. *See* LARSON'S WORKERS' COMPENSATION LAW § 1.01 (Lex K. Larson ed., 2007); *see also* JASPER, *supra* note 29, at 1–2.

33. JASPER, *supra* note 29, at 18.

34. *See* LARSON'S WORKERS' COMPENSATION LAW, *supra* note 32, § 1.03[5] (noting that unlike the tort system, workers' compensation does not seek to restore to the injured party all that she has lost, but instead awards a sum that, added to remaining earning capacity, enables the injured party to exist without being a burden to others).

35. *Id.* § 1.01; JASPER, *supra* note 29, at 10.

36. JASPER, *supra* note 29, at 4; LARSON'S WORKERS' COMPENSATION LAW, *supra* note 32, § 1.01.

37. JASPER, *supra* note 29, at 4.

38. *Id.* at 3; LARSON'S WORKERS' COMPENSATION LAW, *supra* note 32, § 1.01;.

and not to independent contractors or other third parties.[39] Second, employers are liable for only those injuries that arise out of and in the course of employment.[40] More importantly, for purposes of this Article, employees are entitled to compensation for only those injuries that result in partial or total disability and, thereby, affect earning power.[41] Additionally, benefits are limited to three main types of economic benefits: lost wages, expenses for medical treatment, and expenses for rehabilitation services.[42] Employees do not receive benefits to compensate for pain and suffering, mental anguish, loss of enjoyment of life, or other types of noneconomic losses generally compensable in tort.[43] Finally, awards generally are set at a percentage of the injured employee's average wage up to a statutorily imposed maximum amount.[44]

B. The History of Workers' Compensation

1. The Freedom of Contract Regime

Workers' compensation legislation stands as one of the foremost achievements of the Progressive Era. Prior to the adoption of workers' compensation legislation, the common law was the primary avenue of redress available to workers for workplace injuries. "Freedom of contract" or "free labor" was the defining characteristic of this system.[45] Courts asserted that the terms of the employment agreement between the worker and employer controlled liability for workplace injuries.[46] However, the law presumed that under the terms of that agreement, employees assumed the risk of harm arising from the natural and ordinary incidences of the workplace, including the risks associated with the employees' own negligence or the negligence of a fellow employee.[47] The courts reasoned that in

39. LARSON'S WORKERS' COMPENSATION LAW, *supra* note 32, § 1.01.

40. *See id.* § 1.03[1].

41. *Id.* § 1.03[4].

42. JASPER, *supra* note 29, at 17.

43. LARSON'S WORKERS' COMPENSATION, *supra* note 32, § 1.03[4].

44. *See id.* § 1.03[5].

45. *See* PROSSER AND KEETON ON TORTS, *supra* note 1, at 568–69; JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 12–13 (Harvard Univ. Press 2004); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 56 (1967).

46. *See* PROSSER AND KEETON ON TORTS, *supra* note 1, at 568.

47. *See id.*; WITT, *supra* note 45, at 13.

exchange, employees bargained for a rate of compensation that reflected those attendant risks.[48] Consistent with this presumption, the common law recognized three absolute defenses to claims brought by employees against their employers for workplace accidents: (1) the fellow-servant rule, which precluded an injured worker from recovering if his injuries were caused by the negligence of a co-worker rather than a superior; (2) contributory negligence; and (3) assumption of the risk.[49] These defenses had the practical effect of precluding most relief for workplace accidents.[50]

The case of *Farwell v. Boston & Worcester Rail Road Corp.*[51] exemplifies this school of thought. The plaintiff, a railroad engineer, was injured after a fellow employee left a switch in the wrong position, causing the plaintiff to run his engine off the track.[52] The Supreme Judicial Court of Massachusetts denied recovery under the fellow-servant rule.[53] In announcing the fellow-servant rule, the court explained:

> The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectively guard, as the master. They are perils incident to

48. *See* Friedman & Ladinsky, *supra* note 45, at 55.

49. PROSSER AND KEETON ON TORTS, *supra* note 1, at 569, 573 (finding these defenses so restrictive that Professor Prosser labeled them alternatively "the 'unholy trinity' of common law defenses," and the "three wicked sisters of the common law"); Friedman & Ladinsky, *supra* note 45, at 53 ("The fellow-servant rule was an instrument capable of relieving employers from almost all the legal consequences of industrial injuries.").

50. PROSSER AND KEETON ON TORTS, *supra* note 1, at 569. Professor Larson estimates that as a result of these defenses and the requirement of employer fault, at common law, employees were without remedies in 83 percent of cases of workplace accidents. *See* LARSON'S WORKERS' COMPENSATION, *supra* note 32, § 2.03.

51. 45 Mass. 49 (1842).

52. *Id.* at 50.

53. *Id.* at 59.

> the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others.[54]

The court offered some justification of the fellow-servant rule as the measure most likely to ensure workplace safety. To this end, the court observed:

> Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.[55]

Ultimately, however, the court relied on the primacy of the implied contract between employer and employee that allocated the risk of workplace injuries to the employee.[56] The plaintiff argued that the fellow-servant rule should not apply in his case because he and the negligent employee were not employed in the same department or duty.[57] Following the court's reasoning quoted above, the plaintiff reasoned that because he was not employed in the same department as the negligent employee, he could not exert influence over the fellow employee to prevent the negligence.[58] Accordingly, he concluded that the fellow-servant rule should not apply to him.[59] In rejecting the argument, the court relied extensively on the implied contract between the employer and employee. The court concluded:

> Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing

54. *Id.* at 57.
55. *Id.* at 59.
56. *Id.* at 60.
57. *Id.*
58. *Id.*
59. *Id.*

> for his safety, when he is employed in immediate connexion with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of anyone but himself . . . . Hence, the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract . . . .[60]

2. The Shift to Risk Allocation

Progressive Era reformers initially accepted the common law as a system for redress for workplace injuries but challenged the common law defenses that precluded recovery in legislatures.[61] In response to these challenges, several state legislatures adopted Employers' Liability Acts that statutorily abrogated the fellow-servant rule in cases of injuries to railroad employees[62] and employees working in other industries.[63] Progressive efforts on this front even had success on a national level. In 1906[64] and again in 1908,[65] Congress enacted the Federal Employers' Liability Act.[66] The Act statutorily created a cause of action for any railroad

60. *Id.* at 60–61.

61. WITT, *supra* note 45, at 67 ("By 1911, twenty-five states had enacted legislation variously abolishing the fellow-servant rule, modifying the contributory negligence doctrine, and limiting the assumption of risk rule.").

62. For example, the Georgia legislature passed an employers' liability law in 1856 that attempted to statutorily abrogate the fellow-servant rule in railroad accidents. Iowa, Arkansas, Florida, Kansas, Minnesota, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin passed laws abrogating the fellow servant rule by 1900. ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE 1877–1917, at 371 (1999); *see also* WITT, *supra* note 4545, at 67; Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 791 n.42 (1982). At least twenty-five states adopted laws abrogating the fellow-servant rule, instituting comparative negligence or limiting assumption of the risk by 1911. WITT, *supra* note 45, at 67; Friedman & Ladinsky, *supra* note 45, at 64. Professor Sanders attributes this legislative success to the political strength of the railroad unions and also to the large number of railroad accidents and the public visibility of these accidents. SANDERS, *supra*, at 371–72.

63. SANDERS, *supra* note 62, at 371–72 ("Nevada overrode the fellow-servant and contributory-negligence defenses for both mines and railroads, and Colorado had abolished the fellow-servant loophole for all industries before the turn of the century.").

64. Employers' Liability Act, ch. 3073, 34 Stat. 232 (1906), *invalidated by* Howard v. Ill. Cent. R.R. Co. (*Employers' Liability Cases*), 207 U.S. 463 (1908).

65. 45 U.S.C. § 51 (2000). The Supreme Court struck down the initial version of FELA on the grounds that it covered railroad employees who were not engaged in interstate commerce. *See Employers' Liability Cases*, 207 U.S. 463.

66. 45 U.S.C. § 51.

employee injured in a workplace accident. In essence, FELA abrogated the fellow-servant rule and contributory negligence. Even with the abrogation of these defenses, however, injured workers still were required to establish their employers' negligence to recover compensation for their injuries. Levels of compensation were determined on an individual basis.[67]

Eventually, Progressives sought a more sweeping reform of liability for workplace injuries. In workers' compensation, Progressives sought a system of mandatory employer-funded compensation akin to a system of social insurance.[68] Workers' compensation systems removed disputes about liability from the common law system. In so doing, workers' compensation shifted the risk of loss for workplace injuries from worker to employer. More importantly, workers' compensation replaced the common law fault-based system with a system of strict liability.[69] Workers' compensation rested, in part, on a theory that no party—neither employer nor employee—was at fault for a certain level of industrial accidents but rather such accidents were inherent hazards of industry.[70] In part, workers' compensation also rested on the theory that employers should bear the cost of industrial accidents because they were in the best position to minimize the number of workplace accidents.[71] Finally, workers' compensation rested on a recognition of the need for compensation and a realization of the social and economic costs of workplace accidents.[72] Indeed, most historians and legal scholars agree that a significant increase in the number of deaths and injuries arising out of industrial accidents at the end of the nineteenth century helped crystallize public attention on the need to compensate injured workers.[73]

The Progressives' efforts at reform were overwhelmingly successful. As a result of Progressive lobbying and campaigning, almost all states enacted workers' compensation statutes. Indeed,

67. SANDERS, *supra* note 62, at 371 ("In the private sector, employers' liability statutes left recovery for injuries or death to the vicissitudes of the legal process.").

68. WITT, *supra* note 45, at 126–27.

69. PROSSER AND KEETON ON TORTS, *supra* note 1, at 573–74.

70. WITT, *supra* note 45, at 143.

71. *Id.* at 145.

72. *See id.* at 39 ("Free labor's efficiency was called into question by the enormous waste of labor power associated with employee injuries.").

73. *See, e.g., id.* at 24.

forty-two of the then forty-eight states adopted workers' compensation laws by 1920.[74] One study estimated that 67.4 percent of all those gainfully employed were covered by workers' compensation in 1920.[75] By 1963 all states had enacted workers' compensation legislation.[76] Between 1960 and 1980 the percentage of covered employees rose from 80 percent to 87 percent.[77]

C. Coverage for Psychological Injuries

1. Psychological Injuries Accompanied by Physical Injuries

Much as it does in tort law, physical injury serves as a magic key, unlocking the door to workers' compensation coverage for injured workers. All states extend workers' compensation coverage to some degree of psychological injuries related to physical injuries sustained in the course of employment.[78] Some states limit recovery for psychological injuries to only those injuries that are directly caused by the physical injury.[79] However, many states define the requisite relationship between physical and psychological injuries more broadly. For example, many states extend coverage to all psychological injuries as long as the injured worker can demonstrate that the physical injury was a "contributing cause" of the worker's psychological injury.[80] Other states, including Ohio, require merely that the psychological injury "accompany" a physical injury.[81]

74. LARSON'S WORKERS' COMPENSATION LAW, *supra* note 32, § 2.08.

75. *Id.* § 2.08.

76. *Id.*

77. *Id.*

78. *Id.* § 56.03[1].

79. *See, e.g.*, Ruse v. Sedgwick County, 708 P.2d 216, 218 (Kan. Ct. App. 1984) (indicating mental injury benefits recovery depends on showing that the mental injury is directly traceable to a proven physical injury); Castner v. MCI Telecomm. Corp., 415 N.W.2d 873, 873 (Minn. 1987) (stating that for mental injury to be recoverable, it must be caused by a compensable physical injury rather than the claimant's work environment).

80. *See, e.g.*, Jim Walter Res., Inc. v. Riles, 903 So. 2d 118, 123 (Ala. Civ. App. 2004) (holding that an employee who suffered minor injuries in a deadly mine explosion was entitled to workers' compensation benefits for PTSD); City of Tampa v. Tingler, 397 So. 2d 315, 316 (Fla. Dist. Ct. App. 1981) (holding that a police officer's minor job-related injury was sufficient to sustain recovery for PTSD); Boeing Co. v. Viltrakis, 829 P.2d 738, 740 (Or. Ct. App. 1992) (stating that a claimant need only show that the compensable physical injury is a "material contributing cause" of the psychological injury to receive benefits for the psychological injury).

81. *See, e.g.*, Shivel v. Wexford Health Sources, 66 P.3d 414, 415–16 (Okla. 2003) (holding that a health care worker who was stabbed by an inmate was entitled to recover benefits for her

Similarly, some states require only that the psychological injury stem from the same accident as the physical injury.[82]

Thus, when Justice Pfeifer noted in his dissent that McCrone would have received full recovery for her PTSD had she suffered so much as a paper cut during the holdup, his observation would be correct in a significant number of jurisdictions, including Ohio.[83] However, even had she sustained a paper cut or other such physical injury, she still may have been denied coverage in some states. The cause of her PTSD would be the robbery itself rather than any paper cut or other injury she sustained during the robbery. Thus, in states requiring that the physical injury be the cause or a contributing cause of the psychological injury, McCrone would still be denied coverage.

Regardless of whether McCrone suffered a physical injury such as a paper cut and regardless of whether that injury was a cause of her PTSD, of course, the fact that McCrone suffered a real and serious injury in the form of her PTSD would be the same. Likewise, regardless of whether she suffered a physical injury, PTSD would expose her to the same types of potential harms. Sufferers of PTSD, whether accompanied by a physical injury or not, often experience sleep disturbances as well as irritability.[84] Sufferers also may experience physical manifestations such as headaches, dizziness, chest pain, and gastrointestinal distress.[85] Further, under either scenario the cause of McCrone's PTSD would be the robbery itself rather than any paper cut or other injury she sustained during the robbery. Nonetheless, in a significant number of states, the minor injury would unlock the door to workers' compensation coverage to compensate her for the medical care she needed to treat

psychological injuries, even though the attack itself rather than the physical injuries to her back, clavicle and neck caused her psychological injuries, because the Oklahoma workers' compensation act required only that a physical injury "accompany" a psychological injury).

82. *See, e.g.*, Ducharme v. Garland Belongia, 544 So. 2d 590, 593 (La. Ct. App. 1989) (allowing recovery for PTSD because the driver suffered a physical injury and PTSD as a direct result of a traffic accident).

83. McCrone v. Bank One Corp., 107 Ohio St. 3d 272, 2005 Ohio 6505, 839 N.E.2d 1, at ¶ 55 (Pfeifer, J., dissenting).

84. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–64 (4th ed., text rev. 2000) [hereinafter DSM] (describing diagnostic criteria for PTSD, including "persistent symptoms of increased arousal," "difficulty falling asleep or staying asleep," and "irritability or outbursts of anger").

85. *See id.*

her PTSD and for the economic losses she suffered as a result of her disability.

2. Coverage for "Mental/Mental" Injuries

When a worker suffers solely psychological injuries in the course of her employment such as McCrone actually did, access to workers' compensation coverage becomes less certain. The majority of states now extend workers' compensation coverage to at least some portion of mental injuries or disabilities sustained in the course of employment. However, a significant minority of states continue to exclude all mental injuries from coverage in the absence of an accompanying physical injury.[86] Further, some states insist on a physical stimulus or physical impact before allowing recovery for psychological injuries.[87] Thus, only a few states allow recovery for what Professor Arthur Lawson termed "mental/mental injuries"—purely mental injuries arising from a purely mental stimulus such as work stress.[88]

Even among those states that extend coverage to mental/mental injuries, recovery is restricted in several ways in which recovery for physical injuries is not. Some states restrict recovery to only those psychological injuries caused by a sudden event or stimulus such as the robbery in *McCrone*.[89] A significant number of states deny

86. *See, e.g.*, ARK. CODE ANN. § 11-9-113(a)(1) (2002) ("Mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body."); CONN. GEN. STAT. ANN. § 31-275(16)(B) (West 2003) ("'Personal injury' or 'injury' shall not be construed to include . . . (ii) A mental or emotional impairment, unless such impairment arises from a physical injury or occupational disease."); City of Holmes Beach v. Grace, 598 So. 2d 71, 74 (Fla. 1992) ("For a mental or nervous injury to be compensable in Florida, there must have been a physical injury."); Columbus Fire Dept. v. Ledford, 523 S.E.2d 58, 61 (Ga. Ct. App. 1999) (holding no recovery for PTSD in the absence of physical injury); *McCrone*, 107 Ohio St. 3d 272, ¶ 29 ("Psychological or psychiatric conditions, without an accompanying physical injury or occupational disease, are not compensable under [the Workers' Compensation Act].").

87. *See, e.g.*, Jensen v. N.M. State Police, 788 P.2d 382, 385 (N.M. Ct. App. 1990) (noting that the legislative intent of the workers' compensation act is to limit recovery to injuries caused by a sudden emotion-provoking event); Teasley v. Montgomery Ward & Co., 415 S.E.2d 596, 598 (Va. Ct. App. 1992) (noting that a strictly psychological injury must be "causally related to physical injury or be causally related to obvious sudden shock or fright arising in the course of employment" to be compensable); Boeing Co. v. Key, 5 P.3d 16, 18 (Wash. Ct. App. 2000) ("A worker may not receive benefits for a mental disability caused by stress resulting from relationships with supervisors, co-workers or the public, unless she has a mental disability caused by stress which is the result of exposure to a sudden and tangible happening of a traumatic nature and producing an immediate and prompt result.").

88. LARSON'S WORKERS' COMPENSATION LAW, *supra* note 32, § 56.04.

89. *See supra* note 88 and accompanying text.

recovery for stress-induced psychological injuries unless the injuries are caused by extraordinary or unusual stress. These states define extraordinary or unusual stress as stress that is of a greater magnitude than the stress experienced by other workers employed in the similar type of employment or experienced by workers in the workplace in general.[90] In other states, where gradual stress results in a physical injury, workers are required to establish that the workplace stress was greater than the stress of daily life.[91] Others impose a heightened standard of causation or proof, or require specific types of expert testimony. For example, a few states deny recovery unless work stress or stimuli are a predominant cause of the injury.[92] Others require the worker to prove injury or causation by clear and convincing evidence.[93] Still other states extend recovery to only those conditions recognized by the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* or require expert testimony to establish the condition.[94]

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90. *See, e.g.*, MO. REV. STAT. § 287.120(8) (2008) (noting that a mental injury that results from work-related stress "does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work-related and was extraordinary and unusual"); Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 855 (Iowa 1995) (noting that a mental injury arises out of the course of employment when the injury is "caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer"); Bedini v. Frost, 678 A.2d 893, 894 (Vt. 1996) (noting that a psychological injury is compensable if "the stresses at work were of a significantly greater dimension than the daily stresses encountered by all employees").

91. ME. REV. ANN. tit. 39-A, § 201(3) (2001); MO. REV. STAT. § 287.120(8) (2008); OR. REV. STAT. § 656.802(3)(a) (2008).

92. CAL. LAB. CODE § 3208.3(b)(1) (West 2003) ("An employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury."); ME. REV. STAT. ANN. TIT. § 201(3) (2001) ("Mental injury resulting from work-related stress does not arise out of and in the course of employment unless it is demonstrated by clear and convincing evidence that: A. The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and B. The work stress, and not some other source of stress, was the predominant cause of the mental injury."); UTAH CODE ANN. § 34A-2-402(2)(a) (2008) ("Legal causation requires proof of extraordinary mental stress from a sudden stimulus arising predominantly and directly from employment.").

93. *See, e.g.*, ORE. REV. STAT. § 656.802(3)(d) (2007) (requiring clear and convincing evidence that the mental disorder arose out of and in the course of employment); Traweek v. City of W. Monroe, 713 So. 2d 655, 660 (La. Ct. App. 1998) (noting that a clear and convincing standard is a heavier burden of proof than the usual civil case of preponderance of the evidence).

94. *Traweek*, 713 So. 2d at 660 (noting that for mental injury to be compensable, it must be diagnosed by a licensed psychiatrist or psychologist and the diagnosis must meet the most current criteria in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*).

III. THE PUZZLING VITALITY OF THE PHYSICAL IMPACT RULE

A. The Physical Impact Rule and the Myth of Certainty

Courts and legislatures offer two primary reasons for restricting coverage of mental injuries. First, as in tort law, courts and legislatures express concern that psychological injuries are more difficult to diagnose than physical injuries and hence that limitations on such claims are necessary to reduce the incidence of fraudulent claims. For example, in *Bedini v. Frost*,[95] the Vermont Supreme Court imposed a heightened standard of proof on workers seeking benefits for psychological injuries even though the express language of the Vermont Workers' Compensation Act did not appear to impose such a requirement.[96] The court concluded that such a heightened standard was reasonable because of the greater uncertainty in the diagnosis of such injuries.[97] Likewise, in *McCrone*,[98] the Ohio Supreme Court upheld the provisions in the Ohio Workers' Compensation Act allowing recovery for psychological injuries if accompanied by physical injuries but precluding recovery for solely psychological injuries.[99] In so doing, the court accepted arguments by the Bureau of Workers' Compensation that it reasonably treated the two types of claims differently because mental injuries are often difficult to prove.[100] The court noted that "[a]lthough a physical injury may or may not cause a psychological or psychiatric condition, it may furnish some proof of a legitimate mental claim."[101]

Whatever sway this argument may have once held seems diminished by the significant advancements in the diagnosis and treatment of psychological injuries made over the past thirty years. At least since the publication of the *Diagnostic and Statistical Manual Third Edition* ("*DSM*") in 1980, the American Psychiatric Association has recognized explicit diagnostic criteria for a wide

95. 678 A.2d 893 (Vt. 1996).
96. *Id.* at 894–95.
97. *Id.* at 895.
98. 107 Ohio St. 3d 272, 2005 Ohio 6505, 839 N.E.2d 1.
99. *Id.* ¶ 36.
100. *Id.* ¶ 33.
101. *Id.*

array of mental disorders such as those experienced by injured workers in the workplace.[102] The publication of these diagnostic criteria, in turn, has generated extensive empirical research on the diagnosis and treatment of mental disorders.[103] The diagnostic criteria have been revised with the publication of *DSM Fourth Edition* ("*DSM-IV*"). In the preparation of *DSM-IV*, the criteria were developed and validated through extensive review of empirical literature and extensive field trials. For example, in preparing the *DSM-IV*, work groups performed extensive review of existing empirical literature, in part to ensure the reliability of diagnostic criteria.[104] The work groups also conducted twelve field trials of more than 6,000 subjects from more than seventy sites to test the reliability of each set of diagnostic criteria.[105] Additionally, mental health professionals have developed and validated standardized interview questionnaires. For example, studies have demonstrated the reliability of the Composite International Diagnostic Interview.[106] Moreover, an extensive body of research has chronicled the link between exposure to workplace stress and physical and mental health.[107]

To be sure, the existence of diagnostic criteria and even standardized interview criteria does not ensure certainty or even unanimity of diagnosis. Different experts can reach different diagnoses of the same claimant. However, the difficulties and uncertainties involved in diagnosing psychological injuries seem no greater than the difficulties associated with diagnosing some physical injuries. For example, claims regarding lower-back pain have generated conflicting diagnoses both as to their existence and their cause.[108] Nonetheless, legislatures and courts have continued to

102. *See* DSM, *supra* note 84, at xviii.

103. *See id.*

104. *Id.*

105. *Id.* at xix.

106. Susan L. Ettner, Richard G. Frank & Ronald C. Kessler, *The Impact of Psychiatric Disorders on Labor Market Outcomes*, 51 INDUS. & LAB. REL. REV. 64, 66 (1997).

107. *See, e.g.*, sources cited *supra* note 22.

108. *See, e.g.*, Roberts v. Mo. Highway & Transp. Comm'n., 222 S.W.3d 322, 334 (Mo. Ct. App. 2007) (indicating conflicting expert testimony as to whether claimant suffered a herniated disc and conflicting testimony as to whether the herniated disc was caused by a work-related accident rather than personal activities); Patterson v. Wal-Mart Assocs., No. CA 06-1245, 2007 WL 1429815, at *3 (Ark. Ct. App. May 16, 2007) (indicating conflicting testimony about whether claimant's back pain was caused by work accident or preexisting condition).

extend coverage for such physical injuries subject only to the requirement that the worker offer sufficient proof to establish the injury.

Perhaps the more nuanced objection is not that the existence of psychological injuries or disorders is difficult to diagnose with certainty, but that it is difficult to determine whether and to what degree work-related stress contributed to psychological injuries rather than some other stressor.[109] This problem appears to be particularly apparent with respect to psychological injuries caused by gradual work stress rather than by sudden traumatic events. Some limitations placed on recovery for stress-induced injuries may gain traction in light of this objection. However, this hardly seems to be a basis to deny all claims for psychological injuries.

States have grappled with these types of difficult causation issues in the context of physical injury as well as psychological injury. Most notably, two types of physical conditions have raised these same types of causation problems: (1) generalized medical conditions, such as cardiac events or injuries and back injuries other than a herniated disc; and (2) generalized diseases such as pneumonia, arthritis, colitis, or tuberculosis. As Professor Larson has noted in his influential treatise, a few states have limited recovery for these types of physical conditions to cases in which a worker shows that her injury was caused by an unusual exertion outside the scope of her ordinary and usual duties.[110] One reason for imposing this limitation in such cases may be a concern that these types of cases pose the most difficult causation problems. Generalized medical conditions such as these can be caused by a number of factors or stressors other than workplace activities. The unusual-exertion rule may be an attempt to exclude those cases where external stressors caused the worker's injury. Indeed, in

109. *See Bedini*, 678 A.2d at 894 (Vt. 1996); Brief of Defendant-Appellee at 5, 107 Ohio St. 3d 272, 2005 Ohio 6505, 839 N.E.2d 1 (arguing that the Ohio General Assembly rationally excluded "purely psychological claims" because "proof problems with purely psychological injuries are enormous. When is a headache work-induced as opposed to idiopathic in nature?"); STRESS . . . AT WORK, *supra* note 16 (recognizing different schools of thought about the role of the individual worker's characteristics in contributing to job stress but favoring the view that working conditions play a primary role while individual and situational factors may intensify the effect of stressful working conditions).

110. LARSON'S WORKERS' COMPENSATION LAW, *supra* note 32, §43.01.

limiting the unusual-exertion rule to heart cases, the Washington Supreme Court offered just such a justification.

> The fundamental differences between heart attacks and back injuries are such as to render the "unusual exertion" test irrelevant when transplanted into the area of the law dealing with injuries to the skeletal structure of the body, in particular the back. A heart attack, under current persuasive medical theory, is largely related to long-term disease, and may be unrelated to the particular employment hazard to which the worker may be subjected. Thus, the thought that a heart attack suffered during accustomed exertion is really happenstance as to time and place is exemplified in the approach of the majority in *Windhurst*. Contrast this to injuries of the back. It is quite possible that a light or usual strain applied at an unusually different angle could, through the forces of levers, et cetera, overpower and injure a normal back.[111]

A requirement that an injured worker demonstrate that her injuries were caused by extraordinary or unusual stress, likewise, may be an attempt at grappling with the difficult causation issues associated with stress-induced injuries. However, as Professor Larson has explained, the majority of states have not imposed any unusual exertion requirement and allow recovery for physical injuries caused by usual as well as unusual exertions.[112] Moreover, in contrast to the treatment of mental/mental injuries, no state has sought to preclude all recovery for these types of generalized medical conditions.[113]

B. The Physical Impact Rule as a Dam

As they do in denying tort coverage to purely emotional injuries, courts and legislatures also express concern that extending workers' compensation coverage to mental/mental injuries will open the floodgates to a limitless number of claims and impose too great a financial burden on employers.[114] Some notion that claims for

111. Boeing Co. v. Fine, 396 P.2d 145, 147 (Wash. 1964).

112. LARSON'S WORKERS' COMPENSATION LAW, *supra* note 32, § 43.01.

113. *Id.*

114. *See McCrone*, 107 Ohio St. 3d 272, ¶ 35 ("It cannot be said that denying workers' compensation benefits to claimants who simply allege mental disorders or emotional stress due to

psychological injuries are somehow susceptible to fraud or exaggeration seems implicit in this objection.

Coverage for psychological injuries would significantly increase an employer's liability under one of a few scenarios. First, extending coverage to such claims would increase the employer's liability if workers suffer psychological injuries at a significantly greater rate than physical injuries. Second, extending coverage to such claims would increase costs if such claims were more costly because they were more likely to result in greater disability or because the cost to treat such claims was more expensive. To this end, note that objections such as those raised in response to traditional tort claims, such as objections that damages for emotional distress and similar injuries are difficult to quantify and thus subject to large and unpredictable awards, would not be relevant to claims for workers' compensation for psychological injuries. Recall that even in the context of psychological injury, workers' compensation awards benefits for economic losses only, such as lost wages as a result of inability to work and expenses incurred in medical treatment of the injury.[115] Thus, extending coverage to claims for psychological injuries would increase costs only if such injuries resulted in greater disability and hence greater lost wages, or only if the economic costs associated with treatment of these conditions were greater than the costs associated with treatment of physical conditions. Even if any of these assumptions were correct, they would seem poor reasons to exclude coverage. This is particularly true in light of the fact that employer-provided health insurance usually provides lower levels of coverage for mental illness and disorders than it provides for physical injuries and conditions.[116] Moreover, it would not explain concerns over psychological claims as opposed to other frequently occurring physical injuries or other costly physical injury claims. Thus, the concern about a large number of claims seems to be motivated, in part, by a suspicion that these claims are susceptible to fabrication or an unwillingness to accept that these claims require treatment or affect workplace productivity. As discussed above,

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their jobs is irrational, particularly when the requirement of a physical injury enables the state to distribute the limited resources of the fund to disabilities determined by the state to be covered.").

115. LARSON'S WORKER'S COMPENSATION LAW, *supra* note 32, § 1.01.

116. U.S. GEN. ACCOUNTING OFFICE, MENTAL HEALTH AND PARITY ACT: DESPITE NEW FEDERAL STANDARDS, MENTAL HEALTH BENEFITS REMAIN LIMITED 2 (May 2000).

however, advancements in the diagnosis of psychological injuries alleviate much of the concern about fraudulent claims.[117] Recent social science research belies any claim that psychological injuries do not affect workplace productivity.

Moreover, just as doctrines such as the zone-of-danger doctrine seek to limit the scope of plaintiffs to whom the defendant owes a duty as a way to limit the defendant's potential liability, workers' compensation schemes contain other devices designed to limit the scope of claimants for whose injuries employers are liable. Workers' compensation schemes extend recovery to employees only and cover only those injuries that arise in the course of employment. More importantly, employees are eligible for workers' compensation benefits only upon a showing of partial or total vocational disability. Such limitations would seem to alleviate concerns about claims arising from general work dissatisfaction. Thus, unlike the situation posed in tort law, employers do not face limitless liability in the absence of exclusion of coverage for purely psychological injuries. Further, arguments that psychological injuries are not foreseeable risks of workplace stressors seem misplaced as the body of research detailing the link between workplace stress and mental and physical health grows.

IV. A RETURN TO THE OFFICE

Under the current status of the law, workers are presumed at a minimum to assume the risk of psychological injuries resulting from the ordinary and usual level of stress in the workplace.[118] In states with even greater limitations on recovery for psychological injuries, workers like Kimberly McCrone assume the risk of psychological injuries arising from even unusual workplace events.[119] In contrast, under workers' compensation schemes, workers assume virtually none of the risk of physical injury in the workplace—even the risk of injury arising from usual or ordinary events. Indeed, the fundamental premise of workers' compensation was to shift the risk of loss from ordinary workplace perils from the worker to the

117. DSM, *supra* note 84.

118. *See* ME. REV. STAT. ANN. tit 39-A, § 201(3) (2001); MO. REV. STAT. § 287.120(8) (2008); OR. REV. STAT. § 656.802(3)(a) (2008).

119. *See, e.g.*, *supra* note 86 and accompanying text.

employee.[120] The burden on the worker resulting from this distinction is heightened by the relatively lower level of coverage employer-provided health insurance provides for mental illness and disorders.[121]

Why then have so many states been reluctant to apply the underlying risk allocation of workers' compensation to psychological injuries? I suspect that the answer lies in the episode of *The Office* detailed above. Public perception refuses to view mental illnesses and psychological disorders as "real" and serious health risks and continues to discount the negative impact that workplace stress has on mental health and well being. As much as early thinking about industrial accidents placed blame with the injured worker for workplace injuries, a perception continues that sufferers of psychological disorders are responsible for their own conditions and, hence, are not worthy of compensation.[122] These perceptions persist despite a growing base of social science research establishing and quantifying the risks of exposure to workplace stress. For example, in one recent study, the World Health Organization estimated that by 2020 depression and anxiety disorders, including stress-related disorders, will be second only to ischemic heart disease in the scope of disabilities experienced by sufferers.[123] Likewise, researchers have quantified the cost in lost workplace productivity of anxiety disorders.[124]

Most historians and legal scholars have concluded that a significant increase in the number of deaths and injuries arising out of industrial accidents at the end of the nineteenth century helped focus public attention on the problem of workplace accidents and

120. *See* PROSSER AND KEETON ON TORTS, *supra* note 1, at 573.

121. U.S. GEN. ACCOUNTING OFFICE, *supra* note 116, at 2.

122. For example, in distinguishing McCrone's claim of PTSD from other potential claims for psychological injuries, Justice Pfeifer remarked, "We are not dealing in these cases with a person claiming depression because she is bored with her job and really wants to be an actress. This case, *Bunger*, and *Bailey* all present instances in which the psychological injuries were demonstrably tied to a specific traumatic, accidental event in the workplace. They do not present the same issues of proof as "I hate my job"-type depression masquerading as a workers' compensation claim. Allowing benefits in this case does not mean across-the-board compensation for all claims of mental illness. Allowing benefits in this case allows for equal treatment of people with the same, equally provable injuries." McCrone v. Bank One Corp., 107 Ohio St. 3d 272, 2005 Ohio 6505, 839 N.E.2d 1, at ¶ 56 (Pfeifer, J., dissenting).

123. Madhu Kalia, *Assessing the Economic Impact of Stress—The Modern Day Hidden Epidemic*, 51 METABOLISM 49, 49 (2002).

124. *Id.* at 50.

helped crystallize support for a no-fault system to compensate injured workers.[125] Indeed, historians and legal scholars refer to an "industrial accident crisis" that precipitated the workers' compensation resolution.[126] As evidence about the rising level of workplace stress and the negative impact such stress has on our health and well-being as well as our economic productivity begins to mount, perhaps public attention will begin to focus on this new industrial accident crisis.

125. *See* Friedman & Ladinsky, *supra* note 45, at 60.

126. *See* JASPER , *supra* note 29, at 1; WITT, *supra* note 45, at 38–39.