Recovery for Nervous Injury Resulting from Mental Stimulus under Workmen's Compensation Laws

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RECOVERY FOR NERVOUS INJURY RESULTING FROM MENTAL STIMULUS UNDER WORKMEN’S COMPENSATION LAWS

Pathfinder Co. v. Industrial Commission,
62 Ill. 2d 556, 343 N.E.2d 913 (1976)

‘‘[W]hen a man in the course of his employment sustains a nervous shock producing physiological injury, not a mere emotional impulse, he meets with an accident arising out of and in the course of his employment.’’

With this statement, the King’s Bench, in the case of Yates v. South Kirby Collieries, Ltd., allowed a miner, who had suffered a debilitating nervous injury as a result of an unsuccessful attempt to aid a fatally-injured co-worker, to receive compensation under the 1906 Workmen’s Compensation Law of England. More importantly, however, the court thus indicated that in workmen’s compensation cases involving mental or nervous injury, recovery could be obtained even though that injury was incurred solely as a result of a mental stimulus, i.e., in the absence of physical impact upon the person of the claimant. Sixty-six years later, the Supreme Court of Illinois reached the same conclusion in the case of Pathfinder Co. v. Industrial Commission and eliminated the physical impact requirement that had previously been a prerequisite to recovery for nervous injury under the Illinois Workmen’s Compensation Act.

The rise and fall of the physical impact rule in workmen’s compensation cases bears a close resemblance to similar developments in the law of negligence. Although the prerequisites for recovery under any given workmen’s compensation statute are, in general, vastly different from the elements necessary to state a prima facie negligence case, courts have traditionally stated in both areas that there could be no recovery for mental or nervous injury unless there had been some physical impact, no matter how slight or insignificant, upon the person of the plaintiff.

2. Id.
3. 6 Edw. 7, c. 58 (1906).
4. 62 Ill. 2d 556, 343 N.E.2d 913 (1976).
6. A plaintiff in a negligence action must plead and prove the existence of a duty owed him by the defendant, a breach of that duty, causation and damages. W. PROSSER, LAW OF TORTS § 30 (4th ed. 1971) [hereinafter cited as PROSSER]. The claimant in a workmen’s compensation case, however, generally must prove only that he was injured as a result of an “accident” arising out of and in the course of his employment. The claimant is usually able to recover regardless of the absence of negligence on the part of the employer and regardless of any contributory negligence on his own part. 62 Ill. 2d at 563, 343 N.E.2d at 916-17.
7. See PROSSER, supra note 6, at § 54; I. A. LARSON, THE LAW OF WORKMEN’S COMPENSATION § 42.23 (1973).
recent workmen’s compensation cases in which compensation is sought for a mental injury caused by an accident in the form of a mental stimulus clearly reveals that jurisdictions remain in which a claimant will be denied recovery for his mental or nervous injury unless there has been some physical impact upon his person.\(^8\) However, most courts have taken the position of the Illinois Supreme Court in *Pathfinder* and have dismissed the physical impact requirement.\(^9\) This is parallel to a trend in the field of negligence. There the physical impact rule is slowly being eliminated and damages are being awarded to bystander-plaintiffs who have sustained mental injury merely upon witnessing the negligent infliction of harm by the defendant upon a third person.\(^10\)

The purpose of this comment is to analyze *Pathfinder’s* effect upon future workmen’s compensation cases in which recovery is sought for mental injury arising from a mental stimulus. In this analysis the rationale of the Illinois Supreme Court will be examined as well as the applicability of that rationale in those jurisdictions which still adhere to the physical impact rule in mental injury cases. In addition, this comment will consider the possible effect of *Pathfinder* on the physical impact rule vis-a-vis common law negligence, an area which has unfortunately been confused with workmen’s compensation in the past.

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9. See cases cited at note 42 infra.


It is generally held that negligently inflicted mental injury, without more, does not give rise to a cause of action. See Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 249 P.2d 843 (1952). But to this general rule is added the caveat that some forms of mental injury have such a deleterious effect upon the body that they must be treated as forms of physical injury. “[D]efinite nervous disturbances or disorders caused by mental shock and excitement are classified as physical injuries and will support an action for damages for negligence . . . .” *Id.* at 234, 249 P.2d at 844 (quoting with approval trial judge’s charge to jury).

The traumatic neurosis suffered by the claimant in *Pathfinder* (see note 11 infra) is an example of the “definite nervous disturbance or disorder” that is to be treated as a physical injury in negligence cases where the court demands physical manifestations of the emotional disturbance. Whenever the term “mental injury” is used in this comment, it refers to that type of mental disturbance (specifically, traumatic neurosis) which in fact constitutes a physical injury.
NOTES AND COMMENTS

THE FACTUAL BACKGROUND OF PATHFINDER AND THE RATIONALE OF THE SUPREME COURT OF ILLINOIS

In *Pathfinder*, a case of first impression in Illinois, the claimant had just turned away from a co-worker whom she had instructed on the operation of a punch press when she heard cries for help. Upon turning back, she saw that her co-worker's hand had been accidentally caught in the press and had been severed at the wrist. After the claimant extracted the severed hand from the press, she fainted. The claimant was taken to a hospital and was discharged the next day with a final diagnosis of "anxiety reaction." Two weeks after the accident she returned to work but complained during this time of a fear of the machines, nervousness, constant headaches, and numbness in her extremities. As a consequence of these psychological developments, the claimant found that she was unable to work and she filed a claim for disability benefits under the Illinois Workmen's Compensation Act. The Industrial Commission awarded her compensation for temporary total disability but the award was subsequently reversed by the Circuit Court of Cook County. From this judgment the claimant appealed to the Illinois Supreme Court.

The major issue which the court faced on appeal was "whether an employee who suffers a sudden, severe emotional shock, traceable to a definite time and place and to a readily perceivable cause, which produces psychological disability, can recover under the Workmen's Compensation Act... though the employee suffered no physical injury." In answering this question in the affirmative, the court propounded several reasons for rejecting the physical impact requirement. Noting with approval the policy that the Workmen's Compensation Act should be liberally construed to accomplish its purposes and objectives, and that the court had consistently

11. The "anxiety reaction" suffered by the claimant in *Pathfinder* is one example of a "traumatic neurosis," a term used to describe a general psychological disturbance which, in nearly all of the workmen's compensation cases involving mental injury caused by a mental stimulus, is the debilitating nervous injury which forms the basis of the compensation claim. A neurosis can best be defined, in laymen's terminology, as a "form of maladjustment in which a patient, despite the fact that he is oriented to the external world, uses complaints or symptoms of a physical nature to express psychological needs which arise from conflicts that are hidden from the conscious aspect of the mind." Comment, *Traumatic Neurosis and Suicide in Workmen's Compensation Cases*, 11 DePaul L. Rev. 257, 258 (1962). A neurosis is deemed to be "traumatic" when it follows an injury (trauma) to the individual of either a physical or mental nature. Besides anxiety reaction, a traumatic neurosis can take the form of conversion reaction, obsessive reaction, or neurasthenia. For a comprehensive discussion of traumatic neuroses and their legal implications see Schwartz, *Neuroses Following Trauma*, 1 Trauma 31 (1959); 3 Lawyer's Medical Cyclopedia 191 (1970); Comment, *Traumatic Neurosis and Suicide in Workmen's Compensation Cases*, 11 DePaul L. Rev. 257 (1962); Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 Yale L.J. 1129 (1961).


13. 62 Ill. 2d at 362, 343 N.E.2d at 916.

allowed recovery for psychological injury in previous cases where there had been minor physical impact, the court came to the conclusion that there was little to support the physical impact rule. The court noted that the rule's inherent inconsistency

allows an award for a claimant under the Workmen's Compensation Act who is suffering from psychological disabilities caused by an often minor physical injury, but denies an award to a claimant with a similar psychological disability brought about, as here, by a sudden, severe emotional shock and who fortuitously did not sustain any physical injury in his accident.

The liberal interpretation of the Illinois Workmen's Compensation Act and the court's cognizance of the irrationality of the physical impact rule are clearly significant factors which led to the court's rejection of that rule in Pathfinder. However, had it not been for the particular language in the Illinois Workmen's Compensation Act, it is doubtful that the court would have gone so far in its analysis of the physical impact rule. The statutory definition of compensable injury provided in any given workmen's compensation statute determines to a large degree whether a claimant who has suffered a mental injury as a result of a mental stimulus will be successful in securing disability benefits. The existence of restrictive statutory definitions of compensable injury, in addition to the reluctance of some courts to differentiate workmen's compensation from the entirely distinct field of negligence, has proved to be the main barrier to the elimination of the physical impact rule in all jurisdictions. This barrier, and Pathfinder's probable effect upon it, will be examined next.

THE PHYSICAL IMPACT RULE AS A MISPLACED TORT CONCEPT

The workmen's compensation cases that have involved some aspect of mental or nervous injury may be divided into three distinct categories.

The underlying purpose of workmen's compensation legislation in this and other States is to provide financial protection in various forms, including the restoration of lost wages, for workers whose earning power is interrupted or terminated as a consequence of injuries arising out of and in the course of their employment.

15. 62 Ill. 2d at 563-64, 343 N.E.2d at 917. See, e.g., Spetyla v. Industrial Comm'n, 59 Ill. 2d 1, 319 N.E.2d 40 (1974) (claimant fell and struck head on steel table); Hook v. Industrial Comm'n, 53 Ill. 2d 245, 290 N.E.2d 890 (1972) (claimant fell eight feet off of a scaffold and struck his back on a box and some plywood); International Harvester v. Industrial Comm'n, 46 Ill. 2d 238, 263 N.E.2d 49 (1970) (claimant struck in head with tractor part); Olin Indus. v. Industrial Comm'n, 394 Ill. 202, 68 N.E.2d 259 (1946) (metal guard on machine fell and struck plaintiff on breast); Postal Tel. Cable Co. v. Industrial Comm'n, 345 Ill. 349, 178 N.E. 187 (1931) (claimant struck in head by superior).

16. 62 Ill. 2d at 564-65, 343 N.E.2d at 917.

17. ILL. REV. STAT. ch. 48, § 138 (1975) provides that the purpose of the Act is to provide compensation for "accidental injuries or death suffered in the course of employment."

18. "The right of an injured employee to receive compensation is defined in and measured by the statute which creates the right." Charon's Case, 321 Mass. 694, 696, 75 N.E.2d 511, 512 (1947).

first category encompasses those cases in which recovery is sought for a physical injury caused by a mental stimulus. This category includes situations in which a sudden, unexpected occurrence,\(^{20}\) as well as a prolonged stressful situation,\(^{21}\) precipitates some type of physical harm. In cases that fall within this first category, compensation has generally been awarded under the applicable workmen’s compensation statute.\(^{22}\) Similarly, claimants have generally been successful in obtaining disability benefits in those cases that fall within the second category. This category includes cases in which a mental or nervous injury (usually a traumatic neurosis) follows either a physical injury to the claimant or at least some physical impact upon his person.\(^{23}\) The uniformity of opinion regarding recovery present in the first two categories, however, is noticeably absent in the final category which encompasses cases involving mental injury caused by a mental stimulus. Even though most courts today would adhere to the reasoning of *Pathfinder* and allow recovery under the applicable workmen’s compensation statute for mental injury caused by a mental stimulus,\(^{24}\) some courts still have a disinclination to award compensation to claimants who incur injuries of this type during the course of their employment.\(^{25}\)

The reason courts have historically been loath to award compensation in mental stimulus-mental injury cases may be gleaned from an examination of these three categories. In the first two categories, where benefits have usually been awarded, there is the obvious presence of “something physical.” This “something physical” takes the form of either a physical injury to the claimant or a physical impact upon his person which has led to a debilitating mental condition. The category encompassing the mental stimulus-mental injury cases, however, involves neither physical injury nor, more importantly for the purposes of this analysis, physical impact upon the claimant’s person. Thus, the awarding of compensation apparently hinges upon the presence of “something physical.” This demand for “something physical” has consequently led courts to deny recovery for valid claims for disability benefits based on mental injury under workmen’s compensation laws.

In the absence of a statute that explicitly requires physical impact, the


\(^{22}\) See note 8 supra.

\(^{23}\) See cases cited at note 15 supra.

\(^{24}\) See cases cited at note 42 infra.

\(^{25}\) See note 8 supra.
demand for its presence in workmen's compensation cases involving mental injury is undoubtedly due to the misapplication of tort principles to workmen's compensation law. Courts have traditionally held in the field of torts that there could be no damages awarded for mental distress negligently inflicted upon the plaintiff unless there had been actual physical manifestations of injury and physical impact upon his person.\textsuperscript{26} The major rationale behind the creation and implementation of the physical impact rule was that the awarding of damages for mere negligent infliction of mental distress without more would open the proverbial "Pandora's Box" and flood the courts with litigation involving fraudulent claims.\textsuperscript{27} The judicial consensus was that the requirement of physical impact would decrease the possibility of awarding damages for groundless claims because courts could be assured that the mental injury suffered by the plaintiff was real and not feigned.

Physical impact is, then, a tort concept formulated specifically for use in cases involving the negligent infliction of emotional distress in order to determine the validity of mental injury claims. Yet courts dealing with workmen's compensation cases readily embraced the physical impact rule. The judicial reasoning behind this development is not difficult to comprehend. To many courts, the workmen's compensation cases involving mental injury understandably appeared similar to negligence cases involving injuries of the same nature. In both types of cases, recovery was sought for mental injury and the danger of filing fraudulent claims existed whether the alleged mental injury arose in a negligence or workmen's compensation context.\textsuperscript{28} Thus, there appeared to be little reason why the physical impact rule should not be applied to workmen's compensation cases where recovery was sought for mental injury as well as to those cases in the field of negligence.\textsuperscript{29} As a consequence, courts applied the tort rule of physical


\textsuperscript{28} Of particular fear in workmen's compensation cases was (and remains) the awarding of disability benefits to a "malingering," i.e., one who feigns mental injury for the dual purpose of avoiding work and obtaining compensation. The Illinois Supreme Court felt, however, that its recognition of recovery for mental injury resulting from a mental stimulus in \textit{Pathfinder} would not lead to an increase in the number of cases involving claims filed by malingering employees. 62 Ill. 2d at 567, 343 N.E.2d at 919.

\textsuperscript{29} In his article on workmen's compensation, Alexander Manson notes a more subtle explanation for the implementation of the physical impact rule in that field: The impact of old methods of analysis is hard to avoid in any area of intellectual endeavor. It was almost inevitable that certain ways of thinking about a tort case of
impact to compensation cases involving mental injury. In the process they disregarded the fact that the procedures and criteria utilized in granting a workmen's compensation award are vastly different from the processes implemented in negligence cases for determining liability and damages.

The earlier workmen's compensation cases reveal the judicial dependence upon tort principles and the accompanying application of the physical impact rule (in the absence of a statutory requirement) in cases involving some type of mental injury. In the 1932 case of Schuster v. Perryman Electric Co., a cashier was frightened when the office where she worked was held up by "bandits." The claimant's mental distress was objectively manifested by her loss of voice. Although the New Jersey court had the advantage of applying a workmen's compensation statute that allowed compensation for "personal injury" caused by an "accident arising out of and in the course of employment," the court depended primarily upon tort law and refused to grant compensation because there was an absence of physical impact upon the claimant. What is notable about Schuster is that while the New Jersey Workmen's Compensation Act allowed recovery for injury by "accident arising out of and in the course of employment," it allowed it only in situations where the "actual or lawfully imputed negligence of the employer is the natural and proximate cause of the injury." While the New Jersey statute is an anomaly in this regard, its provisions clearly provided the Schuster court with a basis upon which it could easily have dismissed the claimant's action. The claimant's injury was not occasioned by any negligence on the part of the employer but rather by the criminal acts of third persons. However, the court never considered this more obvious approach and instead relied upon the physical impact doctrine in an apparent attempt to declare the applicability of that rule to workmen's compensation cases.


30. "The initial award is granted by an administrative board which is not bound by the rules of evidence or procedural limitations on the courts." Id. at 376 n.8.

31. See note 6 supra.

32. 11 N.J. Misc. 16, 163 A. 437 (1932).


34. The two cases cited by the court in support of its holding, Ward v. West Jersey & Seashore R.R., 65 N.J.L. 383, 47 A. 561 (1900), and Oehler v. L. Bamberger & Co., 4 N.J. Misc. 1003, 135 A. 71 (1926), were both negligence cases.


37. See note 6 supra.
The physical impact rule was not to remain the sacrosanct legal principle that the court in Schuster believed it to be. Gradually support of the rule was eroded in tort cases involving the negligent infliction of mental distress when manifested by a physical illness or bodily harm, particularly in those cases in which the defendant’s negligent act was directed toward the injured plaintiff himself. Consequently, plaintiffs who had previously been denied recovery for negligently inflicted mental distress because there had been no physical impact could now recover damages.

This rejection of the physical impact rule was not universal, however. Illinois was not affected by this trend in negligence law. Courts in Illinois still depend upon the 1898 case of Braun v. Craven and refuse to recognize the compensability of mental injury in the absence of physical impact. But what is of greater importance analytically is the fact that once again developments in workmen’s compensation law in the area of mental injury mirrored developments in common law negligence. In those states that abandoned the necessity of physical impact in negligence, the physical impact barrier fell in workmen’s compensation cases involving mental injury. Likewise, the Illinois courts’ adherence to the physical impact rule


There were two main reasons for this development. The first was that psychiatric techniques had advanced to the point where it could be determined with a reasonable amount of certainty whether or not the mental distress incurred by the defendant’s negligent act was in fact real. Thus, the fear of fraudulent claims was somewhat diminished. Secondly, courts realized the inherent fallacy of the physical impact rule. The mental distress suffered by a plaintiff, who, while crossing the street, has his pants’ leg brushed by an automobile traveling at ninety miles per hour is no greater than that sustained by a plaintiff who is missed by an inch. The practice of awarding damages in the former case because there was physical impact and denying recovery in the latter because there was not dealt a great injustice to injured-party plaintiffs which did not go unnoticed by courts or commentators. These policy arguments are discussed at length in Niedeerman v. Brodsky, 436 Pa. 40, 261 A.2d 84 (1970).

39. See cases cited at note 38 supra. Recovery by bystander-plaintiffs who suffered mental distress as a result of witnessing defendant’s negligent infliction of harm upon a third person was a later development. See text accompanying notes 78-91 infra.

40. 175 Ill. 401, 51 N.E. 657 (1898).

41. See text accompanying notes 93-95 infra.

in negligence was (until *Pathfinder*) reflected in a similar adherence to the rule in workmen's compensation.\(^{43}\)

**THE PHYSICAL IMPACT RULE AS A STATUTORY PREREQUISITE**

To a large extent, the demise of the physical impact rule in workmen's compensation is due either to the acceptance by the courts dealing with mental stimulus-mental injury cases of the rationale used in negligence cases to reject the rule\(^ {44}\) or to the long overdue recognition that any application of tort doctrine to workmen's compensation is erroneous.\(^ {45}\) However, the reasons underlying the judicial abdication of the physical impact rule in workmen's compensation cases are only partially uncovered by an examination of the rule as a misapplied tort concept. Other factors have played a part in the rule's downfall and must necessarily be examined before the courts' rejection of physical impact can be fully understood. One of these key factors is the particular definition of compensable injury found in any given compensation statute.

In nearly all of the compensation cases recognizing recovery in mental stimulus-mental injury situations, the statutory definition of compensable injury was broad enough to allow recovery. It was relatively easy for a court to find that mental injury precipitated by a mental stimulus could be compensable under a statute that awarded disability benefits for "accidental injuries arising out of and in the scope of employment,"\(^ {46}\) "injury by accident,"\(^ {47}\) or "any injury arising out of employment"\(^ {48}\) once the policy underpinnings of the physical impact requirement were found to be unsound. However, not every compensation statute is so broadly constructed. The presence of a workmen's compensation statute requiring that benefits be awarded only when there is evidence of "violence to the physical structure of the body"\(^ {49}\) has usually been sufficient to dissuade courts from completely foregoing the necessity of "something physical."

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43. See cases cited at note 15 supra.

44. See note 38 supra.

45. This was the rationale used in *Pathfinder* to reject any application of tort principles to workmen's compensation cases. 62 Ill. 2d at 562, 343 N.E.2d at 916.


States that have the "violence to the physical structure of the body" definition of compensable injury in their compensation statutes have been the least amenable to the trend of awarding disability benefits in mental stimulus-mental injury cases, as the cases of Bekeleski v. O.F. Neal Co. and City Ice & Fuel Division v. Smith clearly attest. In Bekeleski, the claimant was employed as an elevator operator by the defendant company. While he was operating the elevator, a passenger was fatally injured when he was caught between the elevator and one of the floors of the building. The claimant had the unfortunate experience to be in the elevator for thirty minutes with this dying man. He afterwards claimed that the incident had such a deleterious effect upon his nervous system that he was unable to work and was thus entitled to compensation under the Nebraska Workmen's Compensation Act.

The situation presented in Bekeleski is not unlike that presented in Pathfinder. In both cases the witnessing of the infliction of a serious injury upon a third person resulted in mental injury to the claimant. However, the court in Bekeleski did not have the opportunity to apply to the case the fairly broad definition of compensable injury found in the Illinois act. It was, instead, constrained by the "violence to the physical structure of the body" language of the Nebraska statute. In applying that statute to the case, the court said:

It seems to us that the legislature required . . . that the accident must be accompanied by violence to the physical structure of the body. The language indicates a clear distinction between physical and bodily injury on the one hand and mental, nervous, and psychiatric injury unaccompanied by violence to the physical structure of the body on the other. The plain import of the words used eliminates from the operation of the law disabilities resulting from mental disturbances, nervousness and psychiatric ailments when violence to the physical structure of the body cannot be established.

While the court in Bekeleski denied the claimant disability benefits by engaging in an examination of legislative intent to discern how strictly the compensation statute was to be construed, the court in City Ice applied a statute whose restrictive provisions obviated any necessity of ascertaining the intent of the legislature. In City Ice, the claimant sustained mental injury ("conversion hysteria") after he had been involved in a traffic accident while driving his employer's truck. The claimant suffered no physical injury. The Florida Workmen's Compensation Act provided that "Acci-

50. 141 Neb. 657, 4 N.W.2d 741 (1942).
51. 56 So. 2d 329 (Fla. 1952).
53. See note 17 supra.
54. 141 Neb. at 660, 4 N.W.2d at 743.
dent' shall mean only an unexpected or unusual event, happening suddenly. A mental or nervous injury due to fright or excitement only . . . shall be deemed not to be an injury by accident arising out of employment . . . .55

Not surprisingly, the court refused to recognize the claim.

The existence of a statutory definition of compensable injury requiring that there be "violence to the physical structure of the body" has postponed the total elimination of the physical impact rule and has provided a formidable barrier to recovery for mental injury caused by a mental stimulus in states that have compensation statutes of this kind. However, not all jurisdictions with this type of statute have found it to be so confining. A few courts have managed to circumvent the statute and alleviate its harsh effect by placing primary emphasis not on the cause of the injury but its effect. This approach is best seen in Bailey v. American General Insurance Co.56

In Bailey, the claimant and a co-worker were working on a scaffold eight stories above the ground when one end of the scaffold gave way and the claimant's companion fell to his death. While the claimant was not physically injured, he contended that he was entitled to recover workmen's compensation because the traumatic effect of the accident upon his person directly resulted in a traumatic neurosis (anxiety reaction) that made it impossible for him to return to work. Even though the Texas Workmen's Compensation Act57 defined compensable injury as being "damage or harm to the physical structure of the body," the court held that disability benefits could be awarded. Interpreting the term "physical structure" to mean the entire body and not just the skeletal, digestive, or circulatory systems,58 the court concluded that the claimant's "physical structure"—his body as a whole—no longer functioned properly as a result of this psychoneurotic disturbance.59 Consequently, the claimant's injury was one for which recovery could be obtained under the Texas act.

What is of interest in Bailey is that the court awarded compensation by examining the effect of the claimant's injury and not the cause. Considering the statutory language and the approach taken in other jurisdictions with similarly phrased statutes,60 it is noteworthy that the court refrained from entertaining the question of whether the fact that the injury was caused solely by a mental stimulus would preclude recovery. A close reading of

56. 154 Tex. 430, 279 S.W.2d 315 (1955).
58. 154 Tex. at 436, 279 S.W.2d at 319.
59. Id.
Bailey would thus seem to indicate that the absence of physical impact is not to be considered a bar to recovery. The key issue in cases where recovery is sought for mental injury resulting from a mental stimulus under statutes requiring "violence," "damage," or "harm" to the physical structure of the body under a Bailey analysis is no longer what constitutes "violence," "damage," or "harm" but rather how "physical structure" is to be defined. Consequently, some courts which have awarded compensation in mental stimulus-mental injury cases under this restrictive type of statute have utilized the Bailey approach, emphasized the effect of the injury, and minimized the issue of whether mental stimulus alone is a sufficient causal factor.61

Bailey, however, suffers from the inherent weakness that the court's refusal to deal with the physical impact rule is never explained. If the court had explicitly stated that physical impact was not worthy of discussion because of its irrelevancy, there is little question that the physical impact rule would have been dealt a serious blow in those states that have compensation statutes with restrictive definitions of compensable injury. The court's silence, however, allows for speculation into its rationale. From this speculation two possibilities have emerged: either the court in fact was of the opinion that physical impact was of no concern or it realized that the only way to avoid the physical impact requirement that appears on the face of the statute was to ignore it completely. In light of the experiences that courts in other jurisdictions have had with statutes of a similar type,62 the second alternative cannot be easily dismissed as a possible explanation for the court's reticence to discuss the physical impact issue. If in fact the Bailey decision is the result of a conscious endeavor to sidestep apparent statutory requirements, its effectiveness as authority for the proposition that compensation can be awarded without evidence of physical impact in jurisdictions with statutes that apparently make impact a prima facie element of a compensation claim is greatly diminished. Indeed, if this is the case, Bailey and its progeny would seem to indicate that restrictive statutory language found in many compensation statutes remains the main barrier to the total elimination of the physical impact rule.

The foregoing analysis of the physical impact rule and its effect upon workmen's compensation cases involving mental injury has attempted to show that while the obvious dependence by courts upon the physical impact


62. See text accompanying notes 49-55 supra.
rule has diminished in recent years, the rule still exists in jurisdictions that have the "violence to the physical structure of the body" definition of compensable injury in their compensation statutes. While *Pathfinder* is certainly indicative of the current trend in workmen's compensation cases concerning a mental stimulus-mental injury, its effect upon those jurisdictions with restrictive statutory definitions of compensable injury is lessened as a result of its factual setting. In recognizing recovery in the mental stimulus-mental injury situation, the Supreme Court of Illinois had the opportunity to apply to the facts of the case a compensation statute that included a fairly broad definition of compensable injury. In reality all the court had to do to allow recovery in *Pathfinder* was reject the applicability of tort principles to workmen's compensation. This procedure, however, is relatively ineffective when the statute itself demands that there be "violence to the physical structure of the body." It thus appears that *Bailey*, its weaknesses notwithstanding, is more persuasive authority than *Pathfinder* for a court that deems it necessary to circumvent restrictive statutory language and allow recovery in a mental stimulus-mental injury case. The court in *Bailey* (unlike the court in *Pathfinder*) had to contend with a statute that on its face was not conducive to allowing recovery without the presence of "something physical."

This is not to say that *Pathfinder* is devoid of any persuasive effect whatsoever in jurisdictions that continue to adhere to the physical impact rule because of the presence of a restrictive statute. *Pathfinder* is important insofar as it is one more case in which the physical impact rule has fallen and it indicates clearly the overall erosion of the requirement of physical impact in workmen's compensation cases involving mental injury. However, the existence of a broadly worded definition of compensable injury precludes *Pathfinder* from being regarded as highly persuasive in jurisdictions whose workmen's compensation statutes include restrictive definitions of compensable injury.

63. See note 17 supra.

64. It would indeed be difficult for a court that rejects the physical impact rule in workmen's compensation cases to find appropriate precedential authority within its own state supportive of such a holding. Obviously, no such authority exists. Consequently it is not uncommon to find courts dealing with mental injury-mental stimulus cases citing authority from other jurisdictions which they consider to be persuasive. The Illinois Supreme Court went through such a procedure in *Pathfinder*. Since *Pathfinder* was a case of first impression in the state, the court found no Illinois case law upon which to base its decision. As a result, the court looked to case law from other jurisdictions for support. After noting that the majority of jurisdictions no longer require physical impact, the court cited cases giving support to both sides of the issue. While the court did not consider the holdings in favor of the rule's elimination to be in any way binding upon it, it did find them to be "preferred." 62 Ill. 2d at 565-66, 343 N.E.2d at 918.
EMOTIONAL STRESS AS "ACCIDENT"

Most of the workmen's compensation cases discussed thus far have involved mental stimulus in the form of a sudden, violent happening. There arise situations, however, in which the mental injury sustained by the claimant is incurred not as a result of an unexpected, violent occurrence but rather as the result of a gradual buildup of emotional stress. Since no analysis of the law of workmen's compensation concerning recovery for mental injury resulting from a mental stimulus would be complete without an examination of the situations in which the injury-causing "accident" is emotional stress, the problems surrounding this particular factual situation, their judicial resolution, and the effect of Pathfinder upon future litigation in this area will next be discussed.

Courts dealing with the emotional stress as mental stimulus situation in workmen's compensation cases encounter a two-fold problem in determining whether mental injury allegedly caused in this manner is compensable. First, the court must determine if the accumulation of mental and emotional strain constitutes an "accident" within the meaning of the applicable compensation statute. Second, if the statutory definition of "accident" is met, the court must determine if there was sufficient causation, i.e., whether the mental injury did in fact arise out of the employment situation. An overview of the cases involving emotional stress as "accident" reveals that there is clear majority opinion as to the compensability of mental injury so sustained. The cases of Shope v. Industrial Commission and Ferguson v. HDE, Inc. show the wide disparity in judicial opinions concerning this issue. In Shope, the claimant applied for compensation under the Arizona Workmen's Compensation Act contending that emotional stress at work had led to a disabling anxiety neurosis. While the statute itself allowed compensation for "injury by accident," the court interpreted "accident" to be "any unexpected injury-causing event." It held that the injury was noncompensable because the disability resulted not from an unexpected event but rather from a gradual buildup of emotional stress over a period of years before the injury.

68. ARIZ. REV. STAT. §§ 23-901 to 1091 (1971).
69. Id. § 23-1041(a).
70. The term "accident" was defined in Brock v. Industrial Comm'n, 15 Ariz. App. 95, 96, 486 P.2d 207, 208 (1971).
However, not even a statutory definition of "accident" as an "unexpected or unforeseen event happening suddenly or violently"\(^7\) prevented the Louisiana Supreme Court from holding that emotional stress was included within such a definition in *Ferguson*.\(^7\) In that case an employee suffered a cerebral hemorrhage as a result of a dispute with his employer concerning his paycheck. Although there was precedent\(^7\) supporting the proposition that such an injury could not be compensable because of the language of the Louisiana Workmen's Compensation Act, the court overruled these prior cases insofar as they held that there could be no "accident" (and hence no compensable injury) when the disability results from "extraordinary mental or emotional causes."\(^7\) While *Ferguson* involved physical injury, the court's opinion that mental stimulus in the form of emotional stress could constitute an "accident" under workmen's compensation statutes was echoed in other jurisdictions in cases involving mental injury.\(^7\)

Any possible effect of *Pathfinder* upon a future determination of whether emotional stress may constitute an "accident" in any given workmen's compensation case is lessened by the fact that the holding of *Pathfinder* is narrowly limited to the factual situation presented in that case. It is clear from the way in which the court framed the issue in *Pathfinder*—"whether an employee who suffers a sudden, severe emotional shock, traceable to a definite time and place and to a readily perceivable cause, which produces psychological disability, can recover under the Workmen's Compensation Act... though the employee suffered no physical injury"\(^7\)—that the court was concerned only with a sudden, violent mental stimulus as a cause of mental injury and not with the gradual buildup of emotional stress. Because the issue was so narrowly drawn and the holding so narrowly confined, it appears that *Pathfinder* can have but a limited


\(^{73}\) 264 La. 204, 270 So. 2d 867 (1972), aff'd in part on remand, 274 So. 2d 783 (La. App. 1973).


\(^{75}\) 270 So. 2d at 870. For a discussion of *Ferguson* and the development of emotional stress as "accident" see Note, *Emotional Stress—Now a Cause of Compensable Injury?*, 34 LA. L. REV. 846 (1974).


\(^{77}\) 62 Ill. 2d at 562, 343 N.E.2d at 916.
effect, in Illinois or elsewhere, upon any future determination of the "emotional stress as causal factor" issue.

**THE TREND IN NEGLIGENCE AND PATHFINDER’S EFFECT**

Insofar as the law of torts has in the past had a significant influence upon the field of workmen’s compensation, as evidenced by the parallel developments of the physical impact rule in torts and workmen’s compensation, it is appropriate to examine whether the latter holds true, i.e., whether developments in workmen’s compensation have any effect at all upon the law of torts, particularly negligence law. To this end this comment will now examine whether *Pathfinder* will have any repercussions in this distinct yet traditionally related field.

The closest analogy to the fact pattern of *Pathfinder* to be found in the field of negligence is seen in those cases in which the plaintiff attempts to recover damages for mental injury occasioned by the witnessing of the negligent infliction of harm by the defendant upon a third person. The question of whether a plaintiff who has sustained mental injury in this manner may recover damages is one that is unresolved and open to a great deal of controversy in the law of torts.\(^78\) The traditional view has been that a plaintiff who has suffered a mental disturbance manifested by physical injury as a result of witnessing the negligent infliction of harm upon another could not be awarded damages unless there had been some physical impact upon his person.\(^79\) With the diminution of the physical impact rule, however, courts began to take a more liberal approach. Damages were awarded to bystander-plaintiffs in a number of jurisdictions if the plaintiff could show that at the time of the defendant’s negligent act he feared for his own safety\(^80\) or was within a “zone of danger.”\(^81\)

The Supreme Court of California took a giant step toward abandoning the use of fictions in negligence cases involving bystander-plaintiffs in the seminal decision of *Dillon v. Legg.*\(^82\) In *Dillon*, the mother and sister of a deceased infant sought damages for emotional shock and physical injury


\(^81\). *See Hopper v. United States*, 244 F. Supp. 314 (D. Colo. 1965) (plaintiff’s complaint dismissed because there was no allegation that plaintiff was "personally subjected to the hazard of physical harm").

\(^82\). 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
suffered by them when they witnessed the defendant-motorist strike the infant with his automobile. The lower court dismissed the mother's complaint for failure to state a cause of action, insofar as the emotional distress did not arise out of a "fear for her own safety,"\textsuperscript{83} but sustained the sister's complaint because at the time of the accident she was within the "zone of danger." On appeal, the supreme court condemned the artificiality of the "zone of danger" rule.\textsuperscript{84} In its place the court formulated a foreseeability test in which the mental injury caused to the bystander-plaintiff could be the subject of damages so long as the injury was or should have been reasonably foreseeable to the defendant.\textsuperscript{85} Other factors which the court held to be worth considering in the eventual determination of liability were the nearness of the plaintiff to the scene of the accident, whether the injury resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident as opposed to learning of the accident from another after its occurrence, and the relationship between the victim and the plaintiff.\textsuperscript{86}

The impact of Dillon was widespread and its progeny went even further in applying the foreseeability test and allowing bystander-plaintiffs to recover damages for their mental injury. In Leong v. Takasaki,\textsuperscript{87} the court allowed a ten-year-old boy who had witnessed the defendant-motorist strike his stepgrandmother with his automobile to recover damages for the mental injury he sustained. The court expanded the Dillon holding by stating that the mental injury need not be manifested by physical injury for it to be the subject of damages.\textsuperscript{88} The court also stated that the absence of a blood relationship between the victim and plaintiff would not preclude

\textsuperscript{83} The court depended upon Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1957), in applying this test.

\textsuperscript{84} 68 Cal. 2d at 732-33, 441 P.2d at 915-16, 69 Cal. Rptr. at 75.


\textsuperscript{86} 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

In Archibald v. Braverman, the court awarded damages for mental injury even though the plaintiff did not personally witness the accident. This, however, is strictly a minority position, and most courts refuse to extend Dillon this far.

It is doubtful that Pathfinder, standing alone, could have much effect upon the overall development of negligence law in this area. While courts dealing with workmen's compensation cases in the past have had a propensity to rely upon tort law in determining the compensability of certain employment-related injuries, the opposite does not seem to hold true. It appears that courts have not found principles promulgated in workmen's compensation cases to be in any way determinative of the issues in common law negligence cases having similar fact patterns. Given this tendency of courts dealing with negligence law to refrain from analogizing workmen's compensation cases, and the existence of a considerable amount of case law on the subject, it seems unlikely that any court concerned with a negligence case would find Pathfinder to be persuasive authority for the proposition that a bystander-plaintiff may recover damages for mental injury manifested by physical injury in the absence of physical impact. Courts involved with negligence cases could, however, find Pathfinder to be of some limited use as authority because it is an example of the general trend in the traditionally related field of workmen's compensation to award disability benefits for mental injury in the absence of physical impact.

While Pathfinder's effect upon negligence law may be minimal, its possible prophetic character in the state of Illinois cannot be ignored. Ever since 1898, Illinois courts have consistently maintained that damages cannot be awarded for the negligent infliction of mental distress without physical impact, despite the rejection of this view in a majority of jurisdictions. Although the Illinois Supreme Court made it clear in Pathfinder that its decision to reject the physical impact rule was decided "independently of [its] common law holdings in tort that deal with the question of whether one may be liable for negligently causing mental distress or harm where there was no physical trauma or impact with the victim," the fact...
remains that the court in *Pathfinder* eliminated the physical impact rule in a field of law that is in many ways analogous to negligence law. It is thus possible that *Pathfinder* is an indication of the foreseeable abolition of physical impact in Illinois negligence law.

**CONCLUSION**

While *Pathfinder* is certainly a landmark case in Illinois and will undoubtedly have a substantial effect upon the shape of future litigation in workmen’s compensation cases in this state, its overall effect upon workmen’s compensation law outside of Illinois is likely to be minimal. Given the existence of a compensation statute that defines compensable injury in fairly broad terms, and the overall trend in the field of workmen’s compensation to award disability benefits in the mental stimulus-mental injury situation without evidence of physical impact, the Illinois Supreme Court would have been hard-pressed to find a valid reason for refusing to reject the antiquated physical impact rule and rid Illinois workmen’s compensation law of this stifling vestige of a less enlightened time. Unfortunately, courts in jurisdictions that have restrictive ‘‘violence to the physical structure of the body’’ statutory definitions of compensable injury will not feel so similarly compelled to accept *Pathfinder* as persuasive authority. *Pathfinder*, while indicative of the general trend in workmen’s compensation law, cannot be regarded as being highly persuasive in a jurisdiction where it is not the misapplication of tort principles through case law, but rather the words of the statute itself, that demand physical impact upon the claimant as a necessary condition to recovery for mental injury in workmen’s compensation cases.

Nor will *Pathfinder* be persuasive in those cases in which the injury-inducing mental stimulus takes the form of emotional stress. *Pathfinder* is perhaps more important for what it did not say than for what it said and it did not say that *any* mental stimulus would constitute a sufficient causal factor in mental injury cases. *Pathfinder* was narrowly limited to holding only that a sudden, severe emotional shock, traceable to a particular point in time, was a sufficient causal factor. It never reached the issue of ‘‘emotional stress as accident.’’ The court left that issue to be determined at a future time. If *Pathfinder* is any indication of the progressive direction in which the Illinois Supreme Court is headed, however, the time should not be long in coming when recovery may be obtained under the Illinois Workmen’s Compensation Act for mental injury precipitated by any type of mental stimulus.

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