Nervous Disabilities Induced by Repetitious Mental Trauma Held Noncompensable: Transportation Insurance Co. v. Maksyn

Patricia Sonders

of an employee injured on the job may well be challenged in future consortium actions.[88]

Texas prudently has sided with the majority of jurisdictions by allowing both spouses an action for the negligent impairment of consortium. The importance of this decision lies in the judicial recognition of the very real injury to the marital relationship that may accompany a physical injury to one spouse, as well as in the abandonment of the common law rule that only acknowledged the husband's marital interests. After *Whittlesey*, the negligent injury of a married individual may give rise to two actions: the impaired spouse may sue to recover losses incurred as a result of the injury to his or her body, and the deprived spouse may bring an action for loss of consortium to compensate for the impairment of his or her marital relationship. Texas courts will no longer predicate recovery for an impairment of consortium on the gender of the injured spouse. Although the rejection of the common law rule that denied the wife's recovery is by no means a novel position, the *Whittlesey* court's refusal to rule by precedent alone stands to its credit.

III. CONCLUSION

The recognition of the wife's action for negligent impairment of consortium has been long overdue in Texas. The common law rule was perpetuated by legal fictions and judicial inertia and reflected an anachronistic view of the marital relationship. The few states that continue to deny the wife recovery while recognizing the husband's action preserve a rule that impugns the wife's emotional stake in her marriage and denies a remedy for a real injury to a legally recognized interest.

Paul M. Koning

Nervous Disabilities Induced by Repetitious Mental Trauma Held Noncompensable: Transportation Insurance Co. v. Maksyn

Joe Maksyn began working as a copy boy for the San Antonio Express News in 1932 at the age of seventeen. Within the following fifteen years, Maksyn's service to the newspaper earned him a series of six promotions.

88. The majority of states have interpreted their worker's compensation statutes to preclude any action for loss of consortium arising out of an injury to an insured impaired spouse. *E.g.*, Nichols v. Benco Plastics, Inc., 225 Tenn. 234, 469 S.W.2d 135 (1971); Balcer v. Leonard Refineries, Inc., 370 Mich. 531, 122 N.W.2d 805 (1963). *See generally* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 66, at 12-20 (1975); Comment, *supra* note 8, at 873; Annot., 36 A.L.R.3d 900, 929-31 (1971).

The final promotion placed Maksyn in a problem-solving position involving great pressure. Throughout his forty-three-year career with the newspaper Maksyn worked fifty-five to sixty-five hours per week, often bringing work home with him. Eventually the gradual build-up of stress overcame him. Following an especially strenuous eighty-seven-hour work week, Maksyn suffered a psychoneurotic reaction known as anxiety depression.[1] The Industrial Accident Board awarded Maksyn thirty-six weeks of total disability compensation, and Transportation Insurance Company, the employer's insurer, appealed this award to the district court in Bexar County. Maksyn cross-acted and recovered on a jury verdict for total and permanent incapacity.[2] The court of civil appeals affirmed, holding that Maksyn had suffered a compensable occupational disease.[3] Transportation Insurance Company obtained a writ of error from the Texas Supreme Court. *Held, reversed*: repetitious mental traumatic activities cannot produce a compensable occupational disease under the Texas Workers' Compensation Act. *Transportation Insurance Co. v. Maksyn*, 580 S.W.2d 334 (Tex. 1979).

I. MENTALLY INDUCED NERVOUS INJURY AND THE EVOLUTION OF COMPENSATION CATEGORIES UNDER TEXAS LAW

The issue of compensation for employees who sustain nervous or mental injury has arisen recently in several jurisdictions.[4] In the absence of comprehensive social legislation providing medical care and disability benefits for incapacities of every description, the workers' compensation system is often the only mechanism available to absorb the economic burden created by disabled workers.[5] As the relationship between job-related psychological stress and a significant variety of diseases becomes increasingly pronounced,[6] courts must assess whether, and to what extent, employees

1. Anxiety depression is a subclassification of the broader class of psychoneuroses collectively termed anxiety reactions. All anxiety reactions are characterized by a diffuse and constant anxiety. Associated symptoms of anxiety reaction include inability to concentrate, irritability, and depression. Individuals whose neuroses are termed "anxiety depressions" frequently become severely depressed and harbor suicidal feelings in addition to the other symptoms. *See* Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1131 (1961). *See also* S. ASCH, MENTAL DISABILITY IN CIVIL PRACTICE §§ 2.19-.27 (1973).

2. The jury's findings pursuant to the special issues submitted appear at note 55 *infra*.

3. Transportation Ins. Co. v. Maksyn, 567 S.W.2d 845, 851 (Tex. Civ. App.—San Antonio 1978).

4. For a survey of those jurisdictions that have addressed the issue of compensation for workers suffering from nervous injuries induced by psychological trauma, see 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23, at 7-624 to -642 (1979).

5. *See* Manson, *Workmen's Compensation and the Disabling Neurosis*, 11 BUFFALO L. REV. 376, 387 (1961).

6. The relationship between stress and disease has only recently begun to receive the close scrutiny it deserves. Medical experts, researchers, and psychologists have begun to direct their combined expertise toward a better understanding of stress as a serious health hazard. The results of this research undoubtedly will arouse intense interest among personnel directors and compensation experts, as well as among insurance companies whose scope of liability is likely to be affected. An informative article of particular, but not exclusive, interest to women is Washington, *The Special Health Hazards for Women at Work with an*

disabled as a consequence of psychological stress should be compensated.[7]

Judicial assessment of the proper extent of compensation for nervous injuries is confounded by claimants' difficulties in establishing causation. Although problems of proof are common among claims of mental disability in general,[8] the quantum of proof required to establish causation in workers' compensation litigation may be even greater. Workers' compensation statutes, designed as remedial alternatives to common law tort recovery, are not based on fault;[9] thus, such defenses as contributory negligence and assumption of risk are unavailable to the employer.[10] Liability automatically attaches to the compensation carrier upon a satisfactory showing that the employee's disability proximately resulted "out of and in the course of employment."[11] The closer scrutiny applied to claimants' proof of the causal relationship in workers' compensation cases in which the injury is psychosomatic in origin or effect results from some courts' apprehension that workers' compensation may function as general health insurance if not judicially monitored.[12]

In Texas, difficulties associated with compensation for psychoneurotic disabilities are recurrent, due in part to the evolution of distinct compensation categories under Texas law. In its original form, the Texas Workers'

Emphasis on Stress, 14 FORUM 503, 508-14 (1979). *See also* H. SELYE, STRESS IN HEALTH AND DISEASE (1976).

7. *See generally* Larson, *Mental and Nervous Injury in Workmen's Compensation*, 23 VAND. L. REV. 1243, 1261-75 (1970).

8. One commentator has stated:

> The conduct of a trial raising issues of mental or emotional disability presents more problems of proof than do most civil or criminal cases. The attorney must be prepared to present proof relating to the disability, as well as proof on the substantive issue. . . . The evidence relating to the mental disability will probably raise more difficult problems of proof than the basic substance of the case being tried. This is because of the inherent complexity and more tenuous nature of the psychiatric evidence . . . .

S. ASCH, *supra* note 1, § 10.1.

9. *See generally* Comment, *supra* note 1, at 1130.

10. Professor Arthur Larson has stated:

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. . . .
>
> . . . [T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

1 A. LARSON, *supra* note 4, § 2.10 (1978).

11. Many legislatures have selected the phrase "arising out of and in the course of employment" for workers' compensation statutes to denote that the employee must establish a sufficient causal connection between his job and his disability. Proof of the causal relationship is dependent upon a showing that the working environment created or enhanced the risk of the resulting incapacity. *See, e.g.*, ALA. CODE § 25-5-1(9) (1977); ARIZ. REV. STAT. ANN. § 23-1021 (1971); TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978-1979).

12. *See, e.g.*, Northern Assurance Co. of America v. Taylor, 540 S.W.2d 832, 834 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); Houston Fire & Cas. Ins. Co. v. Biber, 146 S.W.2d 442, 443 (Tex. Civ. App.—San Antonio 1940, writ dism'd judgmt cor.). *See also* Shope v. Industrial Comm'n, 17 Ariz. App. 23, 495 P.2d 148 (1972); Messex v. Georgia-Pacific Corp., 293 So. 2d 615 (La. App. 1974).

Compensation Act[13] covered only accidental injuries and such diseases or infections as naturally resulted therefrom. Job-related illnesses that were not precipitated by an isolated event or accident went wholly uncompensated until 1947, when the Act was amended to include an exclusive schedule of compensable occupational diseases.[14] Thereafter, the worker whose disability could be traced to a specific time, place, and cause in the course of employment styled his claim as an accidental injury.[15] Alternatively, the worker whose disability developed gradually over the term of employment sought compensation for occupational disease,[16] provided that his particular illness appeared among those enumerated in the amendment. Work-related infirmities that were neither enumerated nor capable of identification by specific time, place, and cause remained noncompensable.[17]

Although the exclusive list of occupational diseases evinced legislative recognition that industry creates an increased risk of illnesses as well as accidents,[18] mentally-induced nervous illnesses were not included in this list.[19] It is therefore not surprising that the leading Texas case involving compensable neurosis induced by mental trauma arose on an accidental injury, rather than an occupational disease, cause of action. In *Bailey v.*

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13. 1917 Tex. Gen. Laws, ch. 103, § 1, at 291.

14. A representative sample of compensable occupational diseases as enumerated by the 1947 amendment to Tex. Rev. Civ. Stat. Ann. art. 8306, § 20 includes: poisoning by assorted chemical solutions, gases, and acids; anthrax caused by handling infected animal hides; blisters; dermatitis; asbestosis; silicosis; radiation disease. *See* 1947 Tex. Gen. Laws, ch. 113, §§ 2-9, at 176-80.

15. *See, e.g.*, Texas Employers Ins. Ass'n v. McKay, 146 Tex. 569, 573-74, 210 S.W.2d 147, 150 (1948); Texas Employers Ins. Ass'n v. Villasana, 558 S.W.2d 917, 920 (Tex. Civ. App.—Amarillo 1977, no writ); Northern Assurance Co. of America v. Taylor, 540 S.W.2d 832, 833 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); Olson v. Hartford Accident & Indem. Co., 447 S.W.2d 859, 859 (Tex. 1972); Consolidated Underwriters v. Wright, 408 S.W.2d 140, 148 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

16. Occupational diseases are cumulative disabilities that developed in the ordinary course of employment. Their inception is traceable to the usual risks of employment, rather than to an unanticipated event arising in the course of employment. *See, e.g.*, Hartford Accident & Indem. Co. v. McFarland, 433 S.W.2d 534, 536 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (poisoning from work with insecticides); Frazier v. Employers Mut. Cas. Co., 368 S.W.2d 955, 959 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.) (anxiety from detailed secretarial work); Solomon v. Massachusetts Bonding & Ins. Co., 347 S.W.2d 17, 19 (Tex. Civ. App.—San Antonio 1961, writ ref'd) (lung damage from exterminating work); Texas Employers' Ins. Ass'n v. Cowan, 271 S.W.2d 350, 352 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.) (skin damage from painting). Whether a disease is occupational must be determined by the peculiar characteristics of each employment situation, the type of work in which the employee is engaged, and the effect it has upon the individual. The crucial issue for judicial determination is the type or quality of risk that employment must create in order to satisfy the minimum requirement of legal causation. The various approaches that have been taken to the basic risk issue are discussed in Levin, *Legal Questions Regarding the Causation of Occupational Diseases*, 26 LAB. LAW. J. 88, 93-95 (1975).

17. For example, in Hartford Accident & Indem. Co. v. McFarland, 433 S.W.2d 534, 536 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.), the claimant sustained permanent damage to his heart and liver as a result of continued use of insecticides in the course of his employment. He was denied compensation because his disease was neither traceable to a specific event nor listed on the schedule of occupational diseases.

18. *See* Comment, *The Compensability of Mentally Induced Occupational Diseases Under Texas Workers' Compensation Law*, 10 ST. MARY'S L.J. 148, 150 (1978).

19. *See* note 14 *supra*.

American General Insurance Co.,[20] decided by the Texas Supreme Court in 1955, a structural steel worker witnessed a coworker fall to his death when the scaffold upon which both men had been standing suddenly collapsed. Bailey, who managed to jump to a nearby building, sustained no physical injuries of any consequence. Nevertheless, he did develop an anxiety reaction that manifested itself through total paralysis when he stood at great heights. Since structural steel work is often done at great heights, the neurosis rendered Bailey incapable of performing his job.[21] The supreme court decided in favor of Bailey and removed the requirement of physical impact[22] as a prerequisite to compensation for nervous disability. The court stated:

> "[H]arm" to the physical structure of the body embraces . . . impairment of use or control of physical structures, directly caused by the accident. This interference with use or control in an organism whose good health depends upon unified action and balanced synthesis can be productive of the same disabling signs and symptoms as direct physical injury to the cells, tissues, organs or organ systems.[23]

The *Bailey* court could have justified withholding compensation simply by subscribing to a plain meaning interpretation of the statutory definition of injury[24] or by staunch adherence to the physical impact rule.[25] The court sought, however, to further the essentially remedial purpose of workers' compensation law by construing the phrase "physical structure of the body" to include the entire living and functioning human being and not simply the skeletal structure.[26] By "rejecting the dichotomy between

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20. 154 Tex. 430, 279 S.W.2d 315 (1955).

21. *See id.* at 432-33, 279 S.W.2d at 316.

22. The "physical impact" rule originally functioned as a barrier to tort recovery for psychoneurotic reactions by precluding recovery unless the illness was the proximate result of some physical impact upon the body. *See, e.g.*, Houston Elec. Co. v. Dorsett, 145 Tex. 95, 194 S.W.2d 549 (1946); Gulf, C. & S.F. Ry. v. Trott, 86 Tex. 412, 25 S.W. 419 (1894); Michels v. Boruta, 122 S.W.2d 216 (Tex. Civ. App.—Eastland 1938, no writ). This rule was somehow integrated into workers' compensation law, despite the fact that workers' compensation statutes were created to circumvent obstacles to recovery common to suits in tort. *See* Manson, *supra* note 5, at 377, where the author states:

> 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 negligence would creep into the new scheme of workmen's compensation . . . . The early cases under workmen's compensation exhibited the tendency when they required that an injury could not be compensated unless it resulted from a physical impact to the body.
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> . . . The problem of causality was more readily solved if the court could point to a physical impact, which occurred at work, and the injury appeared in the place of impact.

(footnotes omitted).

23. 154 Tex. at 436-37, 279 S.W.2d at 319.

24. The statute defines injury as "damage or harm to the physical structure of the body." *See* 1947 Tex. Gen. Laws, ch. 113, § 1, at 176.

25. *See* note 22 *supra*.

26. 154 Tex. at 436, 279 S.W.2d at 318. Professor Larson, whose treatise describes the *Bailey* opinion as "one of the most impressive of the earlier decisions on 'nervous' injury," commented:

> What makes the *Bailey* case especially noteworthy is the fact that the award

'mind' and 'body' "[27] the *Bailey* court intentionally superimposed its own definition of injury upon the more restrictive definition provided by the legislature. The court clearly was conscious of the fact that a literal application of the statute's language would deprive an incapacitated employee of compensation in contravention of the law's very purpose.[28]

The *Bailey* court also was influenced to some extent by the ascertainable, accidental quality of the mental shock that precipitated the neurosis.[29] The injury undisputably had arisen in the course of employment as the result of an unanticipated risk. Significantly, *Bailey* did not expressly limit its holding to cases involving accidental injury;[30] yet, all subsequent decisions following *Bailey* have involved mental injuries precipitated by an isolated stressful event.[31] Cumulative disabilities accruing over the course of employment remained within the narrow confines of the 1947 statutory schedule for another sixteen years.[32]

In 1971 the Sixty-second Legislature, for the express purpose of making all diseases arising out of employment compensable,[33] amended the Texas

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was made under a statute defining "injury" as "damage or harm to the physical structure of the body."

. . . .

The opinion is valuable . . . for its well-reasoned, up-to-date analysis of the real nature of injury.

1B A. LARSON, *supra* note 4, § 42.23, at 7-631 to -632 (1979).

27. 154 Tex. at 438, 279 S.W.2d at 319.

28. The *Bailey* court articulated the reasoning behind its expanded concept of injury:

The substance of all of the testimony shows agreement that plaintiff's body no longer functions properly. Now, can we say that, as a matter of law, even though a "physical structure" no longer functions properly, it has suffered no "harm"? What meaning can the word "harm" to the body have if not that, as a result of the event *or condition* in question, the body has ceased to function properly?

Id. at 436, 279 S.W.2d at 318-19 (emphasis added).

29. One authority has insisted that the accidental, sudden quality of the cause of Bailey's neurosis was a crucial factor in the court's decision to award compensation. Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 29 SW. L.J. 183, 187 (1975).

30. That the issue resolved by the *Bailey* decision arose in the context of accidental injury does not necessarily mean that the court intended to preclude application of the holding in cases of cumulative injury. The court was primarily concerned with establishing a theory of compensation for workers suffering from psychologically induced, rather than physiologically induced, mental incapacity; therefore, it did not focus upon the noncumulative nature of the psychological trauma.

31. *See, e.g.*, Travelers Ins. Co. v. Garcia, 417 S.W.2d 630 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (mental ailment bordering on psychosis following a robbery at store where claimant was employed); Aetna Ins. Co. v. Hart, 315 S.W.2d 169 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.) (employee suffered stroke after being severely chastised by customer).

32. *See, e.g.*, Hartford Accident & Indem. Co. v. McFarland, 433 S.W.2d 534, 536 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Consolidated Underwriters v. Wright, 408 S.W.2d 140, 144 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); Frazier v. Employers Mut. Cas. Co., 368 S.W.2d 955 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.).

33. The Texas House of Representatives Committee on the Judiciary described the amendment's purpose: "[T]he present system of listing occupational diseases for which compensation will be given is outdated and inflexible in an age when new and varied employment gives rise to many additional employee health hazards . . . . [A] better approach would be to make all diseases arising out of employment compensable. . . ." HOUSE JUDICIARY COMM., 62D LEGISLATURE OF TEXAS, REPORT ON S.B. 265, at 4 (1971).

Workers' Compensation Act by repealing the exclusive list of occupational diseases and replacing it with a broad definition of the term "occupational disease."[34] This seemingly radical shift in the legislature's conception of occupational disease raised questions as to the continued viability of distinct compensation categories.[35] The legislature's revised posture suggests that neurosis induced by cumulative mental trauma might be compensable as an occupational disease. Prior to the 1971 amendment, all recognized occupational diseases were induced physically;[36] mentally induced incapacities had been compensated only when traceable to a specific time, place, and cause.[37] The elimination of the schedule of physically induced diseases and the addition of the comprehensive definition of occupational disease as "any disease arising out of and in the course of employment"[38] have suggested to at least one commentator that mentally induced occupational diseases are eligible for compensation under the 1971 amendment.[39] In light of the perceived purposes of workers' compensation,[40] the broad scope of the new definition of occupational disease, and the Sixty-second Legislature's avowed intention to make *all* diseases arising in the course of employment compensable, this construction is reasonable.

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34. *See generally* Comment, *supra* note 18, at 151. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978-1979) provides:

> Wherever the terms "Injury" or "Personal Injury" are used . . . such terms shall be construed to mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom. The terms "Injury" and "Personal Injury" shall also be construed to mean and include "Occupational Diseases". . . . Whenever the term "Occupational Disease" is used . . . such term shall be construed to mean any disease arising out of and in the course of employment which causes damage or harm to the physical structure of the body and such other diseases or infections as naturally result therefrom. An "Occupational Disease" shall also include damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities extending over a period of time and arising in the course of employment. . . . Ordinary diseases of life . . . shall not be compensable, except where such diseases follow as an incident to an "Occupational Disease" or "Injury" . . . .

35. For example, in Charter Oak Fire Ins. Co. v. Hollis, 511 S.W.2d 583, 584 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.), the court awarded compensation under amended § 20 and stated: "[I]t is no longer necessary to allege and prove either an event traceable to a definite time, place, and cause or a listed compensable occupational disease." At least one writer has construed this statement to mean that distinct compensation categories are impracticable under § 20, while others consider the continued recognition of distinct categories to be crucial to the amendment. *Compare* Terry, *Occupational Disease and Cumulative Injury*, 8 TRIAL L.F., Apr.-June 1974, at 3 *with* Sartwelle, *supra* note 29, at 184 *and* Comment, *supra* note 18, at 154.

36. *See* 1947 Tex. Gen. Laws, ch. 113, §§ 2-9, at 176-80. *See also* note 14 *supra*.

37. *See* note 31 *supra*.

38. *See* note 34 *supra*.

39. *See* Terry, *supra* note 35, at 3.

40. Professor Larson states:

> The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case . . . , and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

1 A. LARSON, *supra* note 4, § 2.20, at 5 (1978).

The majority of commentators, however, vigorously oppose the contention that the 1971 amendment recognizes the compensability of illnesses induced by cumulative stress and related psychological stimuli.[41] Noting that amended section 20 provides that occupational disease "shall also include damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities,"[42] these authors conclude that the amendment extended coverage only to those diseases that, although gradually induced by physical trauma, had been overlooked by the 1947 list.[43] Supporters of this interpretation draw attention to other sections of the Texas Workers' Compensation Act that, in their view, reveal a legislative intent to preserve the dichotomy between single-event and cumulatively-caused disabilities.[44] Ultimately, however, these advocates rely most heavily upon the problems of proving causation.[45]

The basic premise of the argument advanced by those favoring a restrictive reading of amended section 20 is that the *Bailey* decision still limits the scope of compensation for nervous injuries, notwithstanding the 1971 statutory amendment.[46] Accordingly, these commentators argue that mental injuries induced by mental trauma must continue to meet the strict elemental burden of proof required for accidental injuries.[47] Advocates of this view derive support from the fact that a majority of jurisdictions have allowed recovery only where the injury was precipitated by a specific event,[48] as in *Bailey*. A number of progressive jurisdictions, however, award compensation for cumulative mental trauma.[49]

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41. *See, e.g.*, Sartwelle, *supra* note 29, at 187; *Symposium—Workmen's Compensation: A Pandect of the Texas Law*, 6 ST. MARY'S L.J. 668, 669-71 (1974); Comment, *supra* note 18, at 155; *cf.* Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 354, 348 (1965) (espousing general proposition that providing benefits for most stress-induced psychiatric disorders would extend workers' compensation beyond its intended scope).

42. *See* note 34 *supra*.

43. *See* Sartwelle, *supra* note 29, at 184-87; Comment, *supra* note 18, at 154.

44. One commentator has asserted, for instance, that the 62d Legislature's failure to repeal § 22 of art. 8306 clearly indicates a legislative intent to encourage preservation of separate compensation categories. *See* Sartwelle, *supra* note 29, at 186. Section 22 provides that an occupational disease must be the sole producing cause of disability in order for an employee to recover full benefits; if a preexisting injury contributes to the disability, compensation is reduced accordingly. There is no corresponding provision for accidental injury. In light of the amended language of § 20 to the effect that "[t]he terms 'Injury' and 'Personal Injury' shall also be construed to mean . . . 'Occupational Diseases,' " it is difficult to conclude, on the basis of a different section of the Act passed many years before, that amended § 20 was itself designed to perpetuate a categorical dichotomy that had led to arbitrary denials of compensation. *See* note 17 *supra*.

45. *See* Comment, *supra* note 18, at 158.

46. Sartwelle, *supra* note 29, at 187; Comment, *supra* note 18, at 153.

47. Sartwelle, *supra* note 29, at 187; Comment, *supra* note 18, at 153.

48. *See* 1B A. LARSON, *supra* note 4, § 42.23, at 7-624 to -626 (1979).

49. California, Hawaii, Michigan, and Wisconsin have rejected the contention that an isolated event is necessary in cases of nervous disability in order to ensure that the disability is work-related, and accordingly each state allows compensation for neuroses induced by cumulative mental trauma. In California, Hawaii, and Wisconsin the trier of fact assesses the probative value of claimants' evidence of a causal connection between employment and nervous injury. *See, e.g.*, Baker v. Workmen's Compensation Appeals Bd., 18 Cal. App. 3d 852, 96 Cal. Rptr. 279 (1971) (compensable "cardiac neurosis" induced by cumulative stresses and anxieties of fireman's employment); Royal State Nat'l Ins. Co. v. Labor & In-

For several years following the enactment of amended section 20, Texas appellate courts rendered infrequent interpretations of the new occupational disease amendment. Those occupational disease cases that did obtain appellate review under amended section 20 involved varieties of cumulative physical trauma only.[50] The Texas Supreme Court had yet to confront directly the question of whether cumulative mental traumatic experiences can result in compensable occupational diseases under amended section 20.

II. TRANSPORTATION INSURANCE CO. V. MAKSYN

The Texas Supreme Court granted a writ of error in order to address Maksyn's workers' compensation claim for nervous disability induced by the gradual accumulation of psychological stress. A unanimous court decided that amended section 20 affords coverage for injuries induced by repetitious physical, but not repetitious mental, traumatic activities.[51] Aligning itself with the position advanced by the majority of commentators on the amended statute's scope,[52] the court held that mentally induced nervous illnesses are compensable only as accidental injuries, and as such require proof of a specific time, place, and cause.[53]

Following a detailed recapitulation of the stressful period preceding Maksyn's anxiety depression,[54] the court found abundant evidence that mental stimuli had caused Maksyn's condition, but found no evidence from which the jury could have determined that any physical traumatic activity had produced it.[55] The court was thus called upon to decide for

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dus. Relations Bd., 53 Hawaii 32, 487 P.2d 278 (1971) (trainer's mental breakdown induced by cumulative job anxieties and thus compensable); Swiss Colony, Inc. v. Department of Indus., Labor & Human Relations, 72 Wis. 2d 46, 240 N.W.2d 128 (1974) (nervous breakdown precipitated by mounting pressures of purchasing agent's employment held compensable). In Michigan the employee's subjective perception of the degree of stress in his working environment is paramount. *See* Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960) (production line worker's neurosis compensable even though stresses of employment were not objectively unusual under the circumstances).

50. *See* Employers Commercial Union Ins. Co. v. Schmidt, 516 S.W.2d 117 (Tex. 1974) (chronic myositis from working in stooped position); Standard Fire Ins. Co. v. Ratliff, 537 S.W.2d 355 (Tex. Civ. App.—Waco 1976, no writ) (repetitious pressing of knee against lever); Charter Oak Fire Ins. Co. v. Hollis, 511 S.W.2d 583 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (inhalation of toxic substances throughout 20 years of employment).

51. 580 S.W.2d at 334.

52. *See* note 41 *supra*.

53. 580 S.W.2d at 338.

54. *Id.* at 335. A capsulized version of the facts appears in the text accompanying note 1 *supra*.

55. At trial, in response to the special issues submitted, the jury found: (1) that Maksyn had or had had an occupational disease as a result of repetitious physical traumatic activities; (2) that the occupational disease had arisen out of and in the course of employment; (3) that the occupational disease was a producing cause of Maksyn's total incapacity, which commenced on Sept. 4, 1974; and (4) that the duration of the incapacity was permanent. The court of civil appeals, affirming Maksyn's award, found that his disability had resulted from a combination of mental and physical activities, including nerve-wracking pressure, long working hours, and physical exhaustion. 567 S.W.2d at 851. In its brief to the supreme court, the insurance company raised as error the lower court's holding that there was legally

the first time whether mental injury induced by cumulative mental trauma was sufficient to bring a claimant within the definition of occupational disease. Resolution of this question required a sentence-by-sentence analysis of amended section 20.

Observing that the first sentence of section 20, which defines "injury" as "damage or harm to the physical structure of the body," had not been amended since 1947,[56] the court concluded that case law that had developed under that sentence remained intact.[57] Cases that had construed "injury" to mean the direct consequence of a traceable accident were cited by the court,[58] including *Bailey* and its innovative interpretation of "physical structure of the body."[59] Maksyn relied on *Bailey* to establish his right to compensation, while the insurance company attempted to distinguish the cumulative causation of Maksyn's disability from the isolated causal event found in *Bailey*.[60] Although *Bailey*'s extension of compensation to mentally induced neurosis was upheld, the court adopted the narrower interpretation urged by the insurer,[61] viewing the existence of a single ascertainable causal event as crucial to the *Bailey* decision.[62] Specifically, *Bailey* was read to have equated "mental" with "physical" for the purpose of the result, but not the cause, of an injury.[63] Thus, the *Bailey* decision, which had been considered one of the strongest cases supporting Maksyn's contention in the court below,[64] afforded no basis for the compensation of repetitious mental trauma culminating in neurosis.

The court's reconciliation of the *Maksyn* case with *Bailey* is dependent upon the continued recognition of distinct compensation categories. Justice Pope identified two sources supporting the viability of distinct categories: legislative intent to preserve the effect of prior decisions, as embodied

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sufficient evidence of repetitious physical traumatic activities to support the jury's finding. Brief for Appellant at 6. Evidence relating to the date of the disability's onset was also raised as error on the basis of insufficiency, but the supreme court's disposition of the first point of error in favor of the insurance company mooted that issue.

56. *See* 1947 Tex. Gen. Laws, ch. 113, § 1, at 176.

57. 580 S.W.2d at 336.

58. *See* cases cited at note 15 *supra*.

59. 580 S.W.2d at 336; *see* note 26 *supra* and accompanying text.

60. Briefs of counsel for both appellee and appellant focused heavily on the *Bailey* opinion and the proper extent of its application, because § 5 of the 1971 amendatory act states that "nothing contained in this Act shall ever be deemed to limit or expand recovery in cases of mental trauma accompanied by physical trauma." 1971 Tex. Gen. Laws, ch. 834, § 5, at 2541; Brief for Appellant at 12 and Brief for Appellee at 4. Thus, if *Bailey* were construed to include claims for cumulative mental trauma, denial of benefits to Maksyn would constitute a proscribed limitation on recovery. Conversely, if *Bailey* were construed to limit its application to accidental injury claims, an award to Maksyn would be a proscribed expansion.

The court's reliance upon § 5's caveat when characterizing Maksyn's award as a proscribed expansion of recovery is somewhat paradoxical, however, in view of the court's initial finding that Maksyn's mental trauma was *not* accompanied by physically traumatic activities. *See* note 55 *supra* and accompanying text.

61. 580 S.W.2d at 336-37.

62. *Id.*

63. *Id.* at 337.

64. Transportation Ins. Co. v. Maksyn, 567 S.W.2d 845, 848-49 (Tex. Civ. App.—San Antonio 1978).

in section 5 of the 1971 Act,[65] and the use of both "Injury" and "Occupational Disease" in the second sentence of amended section 20.[66] The third sentence,[67] defining occupational disease as any harmful disease arising out of employment, was accorded only a cursory examination, notwithstanding its comprehensive implications.[68]

The *Maksyn* case was resolved primarily by the court's construction of the fourth sentence of section 20,[69] which provides that occupational disease shall also include harm to the physical structure of the body as a result of repetitious physical traumatic activities. Maksyn's contention that the amendment contemplated recovery for repetitious mental, as well as physical, trauma was rejected following an examination of the amendment's legislative history.[70] The fact that Senate Bill 265 had originally contained the phrase "repetitious mental or physical activities,"[71] but as enacted read "repetitious physical traumatic activities,"[72] convinced the court that the legislature intended to preclude recovery for cumulative mental injury.[73]

In an effort to justify the court's denial of occupational disease status to all cumulative mental injuries, Justice Pope presumed that the legislature had drafted section 20 in recognition of the problems of proof that the court envisioned any alternative holding would present.[74] The court of appeals' interpretation, which construed section 20 not to mean that there can never be recovery for a cumulative mental injury or illness but rather that the claimant must produce sufficient evidence probative of the causal connection,[75] was ignored entirely. Instead of formulating a construction

65. *See* note 60 *supra*.

66. 580 S.W.2d at 337. No explanation is given as to how the court concluded that this sentence preserves distinct categories, save that the sentence is "transitional."

67. *See* note 34 *supra*.

68. 580 S.W.2d at 337. The only reason given by the court for not discussing this seemingly pervasive sentence of the amendment in greater detail was that the phrase "physical structure of the body" had already been mentioned in relation to *Bailey*. The fact that the sentence also defines occupational disease as any disease arising out of and in the course of employment should have triggered greater analysis. If the court was in fact under the impression, as it appears to have been, that by the phrase "any disease" the legislature actually meant only particular classifications of disease, it might have profitably elaborated on the reasoning underlying such a reading.

69. *See* note 34 *supra*.

70. 580 S.W.2d at 337-38.

71. TEX. S.J. 666 (1971).

72. *Id.* at 5378; *see* note 34 *supra*.

73. 580 S.W.2d at 338. "The legislature chose to include coverage for physical activities that cause the harm or damage; it excluded coverage for mental activities. The deletion of a provision in a pending bill discloses the legislative intent to reject the proposal." *Id.*

74. *Id.* The court injected its own concerns into its interpretation of the legislature's intent: "The legislature very well reasoned that physical activities are identifiable and traceable whereas such factors as worry, anxiety, tension, pressure, and overwork are not. In the case of mental activities, there must be the more reliable proof of an ascertainable time, place, and event." *Id.*

75. 567 S.W.2d at 849. In response to the insurance company's admonitions regarding problems of proving cumulative mental trauma as a cause of nervous disability, the court of civil appeals stated:

> We see very little justification for a holding that a claimant can recover for a

designed to strike a practicable balance between competing considerations, the supreme court read the amendment narrowly,[76] in sharp contrast to the purposeful statutory reading rendered by the *Bailey* court.

In holding that cumulative mental trauma cannot produce a compensable occupational disease, the *Maksyn* decision functions to deprive a significant class of insured claimants of the opportunity to prove that their nervous injuries arose out of and in the course of employment. The supreme court seemed motivated primarily by its apprehension that cumulative psychological stresses and anxieties are often less susceptible to exact proof than cumulative physical traumatic activities. Nevertheless, the complex etiology of *some* gradually induced nervous disorders should not in and of itself form an impenetrable barrier to recovery for *all* such claims.[77]

The court's desire to discourage the expenditure of judicial time and resources on frivolous or tenuous claims is readily understood in light of crowded court dockets and the need to limit benefits to disabilities precipitated by the employment environment. The blanket exclusion of all claims of cumulative mental trauma from the occupational disease category, however, is an abdication of judicial responsibility to those claimants who can prove the requisite causal connection between job stress and their nervous disabilities. The sufficiency of evidence probative of the causal relationship is a question that might be more appropriately resolved by triers of fact on a case-by-case basis.[78] This approach, which has already been adopted by a number of states,[79] would serve to ferret out unfounded claims while providing compensation to those capable of establishing the causal relationship.

> neurosis occasioned by one traumatic experience, but cannot recover for a similar neurosis caused by a number of such traumatic experiences.
>
> . . . .
>
> Plaintiff argues that to permit recovery by defendant would open a "Pandora's Box" and employers would be subject to fraudulent and frivolous claims. This same contention has been made in the past to numerous types of negligence actions where recovery is now allowed, and we do not consider such argument as controlling, as a claim must be supported by sufficient proof to convince the trier of facts.

Id.

76. 580 S.W.2d at 337-38.

77. In light of the overwhelming amount of evidence probative of the causal relationship between Maksyn's employment and his work and the dearth of evidence tending to show that external causes had contributed to the disability, it appears that the *Maksyn* case was decided on the basis of potential fact situations rather than on the basis of the fact situation at bar. Certainly some claimants might seek recovery without adequate probative evidence, but such criticism could scarcely be made of Maksyn himself, who had devoted essentially every waking hour to his job.

78. For instance, the *Maksyn* case has already been cited as controlling in a case involving a claim for nervous disability allegedly induced by claimant's supervisor repeatedly addressing her in a "gruff tone of voice." University of Texas Sys. v. Schieffer, No. 12,826, slip op. at 2 (Tex. Civ. App.—Austin, Apr. 11, 1979). It is difficult to believe that such a claim would not have been dismissed on its own facts had the *Maksyn* court left intact the court of civil appeals' reading of the amendment.

79. *See* note 49 *supra*.