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Kelly's Case, 17 Mass. App. Ct. 727, 462 N.E.2d 348 (1984)

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KELLY'S CASE

I. INTRODUCTION

In *Kelly's Case*[1] the appeals court of Massachusetts ruled that a claimant's emotional breakdown, caused by "identifiable stressful work-related incidents,"[2] constituted a compensable "personal injury"[3] within the meaning of the Workmen's Compensation Act.[4] In reaching its decision, the court distinguished claimant's mental injury both from gradually developing mental injuries and from those resulting from "wear and tear."[5] The holding extended the trend in Massachusetts workers' compensation cases toward compensating mental disorders caused by stressful incidents at work.[6]

II. FACTS

Kelly had experienced no mental problems during her twenty-two year employment and was well adjusted at home and at work.[7] On Friday, August 19, 1977, her employer informed her that she would be laid off, and she became extremely upset and went home early. On Monday, August 22, 1977, her employer told her that she would be transferred to another department. The decision depressed Kelly. She developed severe chest pains and was taken to the hospital, where a physician examined her and prescribed medication for an emotional disorder. She returned to work six weeks later, beginning her work in the new department, but on October 14 she again developed severe chest pains and was taken to the hospital. Subsequently,

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1. 17 Mass. App. Ct. 727, 462 N.E.2d 348 (1984).

2. *Id.* at 732-33, 462 N.E.2d at 352 (quoting Albanese's Case, 378 Mass. 14, 18, 389 N.E.2d 83, 86 (1979)); *see infra* note 15.

3. MASS. ANN. LAWS ch. 152, § 26 (Michie/Law. Co-op. 1976).

4. *Id.* ch. 152, § 1-86 (Michie/Law. Co-op. 1976 & Supp. 1984).

5. *Kelly*, 17 Mass. App. Ct. at 730, 462 N.E.2d at 350.

6. In *In re* Fitzgibbons' Case, 374 Mass. 633, 373 N.E.2d 1174 (1978), Massachusetts first allowed recovery "in cases involving mental disorders or disabilities causally connected to mental trauma or shock arising out of the employment." *Id.* at 637, 373 N.E.2d at 1177. The court stated, "There is no valid distinction which would preclude mental or emotional disorders caused by mental or emotional trauma from being compensable." *Id.* *See infra* notes 51-58 and accompanying text. *See also* Foley v. Polaroid Corp., 381 Mass. 545, 413 N.E.2d 711 (1980); Albanese's Case, 378 Mass. 14, 389 N.E.2d 83 (1979).

7. *Kelly*, 17 Mass. App. Ct. at 728, 462 N.E.2d at 349.

she received regular psychiatric treatment for depression.[8] The psychiatrist who treated her testified that Kelly had been totally disabled since August 22, and that hearing of her layoff and transfer had caused her psychiatric problems.[9]

In a hearing, a single member of the Industrial Accident Board[10] found that Kelly had suffered no industrial injury[11] within the meaning of the Act on either August 22 or October 14, although her psychiatric problems were "caused by her hearing that she was to be laid off from one department and transferred to another."[12] The reviewing board affirmed the decision.[13] Kelly appealed under section 11 of the Workmen's Compensation Act.[14] The superior court, relying on *Albanese*'s *Case*,[15] reversed[16] and ordered payment of temporary total inca-

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8. *Id.*

9. *Id.* at 728, 462 N.E.2d at 349-350.

10. The Industrial Accident Board, consisting of twelve members, each appointed to a twelve-year term, adjudicates contested cases, supervises agreements, and administers other phases of the Workmen's Compensation Act. MASS. ANN. LAWS ch. 23, § 15 (Michie/Law. Co-op. Supp. 1984). No more than six members can be of the same political party. *Id.* Under the Act, if the parties cannot reach agreement, either party may request and receive a hearing with a single member of the Board, who may determine, after reviewing all the evidence, to modify or terminate compensation. *Id.* ch. 152, § 7. "Any party aggrieved by an order filed under this section . . . may request the division to set the case for a hearing before another member thereof." *Id.* Under section 10, either party may file a claim for review of the decision by the single member. *Id.* § 10. The reviewing board, which consists of at least three other members of the Board, may hear evidence and revise the decision in whole or in part, or may refer the matter back to the single member. *Id.* A party still dissatisfied with a decision of the reviewing board may, under section 11, appeal to the superior court or the municipal court of Boston for judicial review. *Id.* § 11. The Board has no power to enforce its orders or decisions, but must instead seek enforcement in the superior court under section 11. *Id. See generally* 29 L. LOCKE, WORKMEN'S COMPENSATION § 462 (2d ed. 1981 & Supp. 1984).

11. The legislature defined *industrial injury* as "personal injury arising out of and in the course of" employment. MASS. ANN. LAWS ch. 152, § 26 (Michie/Law. Co-op. 1976). *See* 29 LOCKE, *supra* note 10, § 211.

12. *Kelly*, 17 Mass. App. Ct. at 728, 462 N.E.2d at 350.

13. *Id.* at 729, 462 N.E.2d at 350.

14. MASS. ANN. LAWS ch. 152, § 11 (Michie/Law. Co-op. Supp. 1984).

15. 378 Mass. 14, 389 N.E.2d 83 (1979). Albanese held the position of foreman for twenty years. Three years before his claim, the owner sold the business, and thereafter employees attempted to unionize. Albanese found himself caught in the conflict between management and workers. Three times the plant manager told him to announce curtailment of special employee benefits, and Albanese reluctantly complied. Each time the manager reversed his decision, publicly embarrassing and upsetting Albanese. After the last episode Albanese went home with chest pains, nausea, sweating, shortness of breath, and dizziness. He never worked again. *Id.* at 14-15, 389 N.E.2d at 84. The court, relying on Fitzgibbons' Case, 374 Mass. 633, 373 N.E.2d 1174 (1978), held that Albanese was entitled to compensation, finding that an employee who suffers a mental injury "causally related to a series of specific stressful work-related incidents" can recover compensation. Albanese's Case, 378 Mass. at 14-15, 389 N.E.2d at 84.

pacity compensation benefits[17] under section 34 of the workers' compensation act.[18] The appeals court affirmed the judgment of the superior court.[19]

III. ANALYSIS

Professor Arthur Larson developed three categories for analyzing workers' compensation cases involving either mental causation or emotional injury:

(1) physical injury caused by mental stimulus;
(2) nervous injury caused by physical trauma;
(3) nervous injury caused by mental stimulus.[20]

Currently, cases in the first and second categories almost always are found compensable as long as other statutory requirements are met[21] because something exists "to satisfy the old-fashioned legal insistence upon something 'physical.' "[22] The third category remains a battleground in some states,[23] although a majority of jurisdictions sup-

16. *Kelly*, 17 Mass. App. Ct. at 729, 462 N.E.2d at 350. The decision of the reviewing board is final unless it is unsupported by the evidence or a "different conclusion is required as a matter of law." *Id.* at 729 n.3, 462 N.E.2d 350 n.3 (quoting Corraro's Case, 380 Mass. 357, 359, 403 N.E.2d 388, 390 (1980)). The judge in Kelly's Case accepted the reviewing board's finding of facts but reversed because Kelly was entitled to compensation as a matter of law. *Kelly*, 17 Mass. App. Ct. at 729 n.3, 462 N.E.2d at 350 n.3.

17. *Kelly*, 17 Mass. App. Ct. at 729, 462 N.E.2d at 350.

18. MASS. ANN. LAWS. ch. 152, § 34 (Michie/Law. Co-op. Supp. 1984). Section 34 sets compensation using a formula based on two thirds of claimant's weekly wage, not to exceed the average weekly wage in the Commonwealth. *Id.*

19. *Kelly*, 17 Mass. App. Ct. at 727, 462 N.E.2d at 349.

20. Larson, *Mental and Nervous Injury in Workmen's Compensation*, 23 VAND. L. REV. 1243 (1970).

21. *Id.*

22. 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23 (1982 & Supp. 1984). *See also* Larson, *supra* note 20, at 1251.

23. The courts that have denied compensation for nervous injury resulting from mental trauma are Arizona, Florida, Georgia, Kansas, Louisiana, Minnesota, Montana, Nebraska, Oklahoma, Pennsylvania, and Rhode Island. For a state-by-state analysis of cases, see LARSON, *supra* note 22, § 42.23 n.82. *See also* Larson, *supra* note 20, at 1243, 1253. Rapid change toward favoring compensability has occurred since Larson stated in 1970 that on the issue of compensability, cases in the third category were evenly divided. *Id.* at 1243. The court in Fitzgibbons Case cited the Larson article. 374 Mass. 633, 638, 373 N.E.2d 1174, 1177 (1978).

In the landmark case of Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955), the employee suffered numerous debilitating nervous symptoms and inability to work after an accident involving himself and a co-worker. *Id.* at 432, 279 S.W.2d at 316. In the accident, scaffolding collapsed, causing the co-worker to plunge to his death. *Id.* The claimant believed he would be killed as well, but a cable prevented his fall. *Id.* A superior structural steelworker, he developed a fear of working in high places after the accident. *Id.* He received compensation despite statutory language that required "damage

ports compensability.[24]

A long line of Massachusetts case law supports compensation in the first two categories.[25] In *Charon*'s *Case*,[26] for example, claimant suffered a left-side paralysis caused by her fright when lightning struck the plant where she worked.[27] Although she suffered no physical impact, the supreme judicial court reversed a decree denying compensation, stating that the statute did not deny recovery merely because there was injury without physical impact or other "external violence to the body."[28] *Charon* is notable because at the time no recovery existed at common law for an injury caused entirely by fright or other form of mental disturbance.[29] The *Charon* court distinguished *Spade v. Lynn & Boston R.R.*,[30] the controlling case, stating that the principle enunciated in *Spade* for denying recovery could not be extended to workers' compensation cases.[31]

The Workmen's Compensation Act represented a response to the inadequacy of the tort negligence system. The Act permits compensation to employees for injuries causally related to their work.[32] The courts have liberally allowed compensation because the Act requires an employee at the outset of employment to choose either the right to bring an action in tort or coverage under workers' compensation as the sole remedy for an industrial injury.[33] The Act has a twofold purpose:

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or harm to the physical structure of the body." *Id.* at 435-36, 279 S.W.2d at 318. The Texas court denied that an injury that prevented the body from functioning properly could be outside the definition of "harm." *Id.* at 436, 279 S.W.2d at 318-19.

24. The courts that have permitted compensation for nervous injury resulting from mental trauma are federal, Arizona, California, Florida, Georgia, Illinois, Kentucky, Massachusetts, Michigan, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. For a state-by-state analysis of cases, see LARSON, *supra* note 22, § 42.23 n.81.

25. Egan's Case, 331 Mass. 11, 116 N.E.2d 844 (1954); McMurray's Case, 331 Mass. 29, 116 N.E.2d 847 (1954); Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947); Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940); Hunnewell's Case, 220 Mass. 351, 107 N.E. 934 (1915); Hale's Case, 4 Mass. App. Ct. 769, 340 N.E.2d 921 (1976).

26. 321 Mass. 694, 75 N.E.2d 511 (1947).

27. *Id.* at 695, 75 N.E.2d at 512.

28. *Id.* at 696, 75 N.E.2d at 512.

29. Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897).

30. *Id.*

31. *Charon*, 321 Mass. at 696, 75 N.E.2d at 513.

32. 29 LOCKE, *supra* note 10, § 1.

33. MASS. ANN. LAWS ch. 152, § 5 (Michie/Law. Co-op. 1976). *See, e.g.*, Foley v. Polaroid Corp., 381 Mass. 545, 413 N.E.2d 711 (1980) (employee barred from bringing an action in tort against his employer because he failed to give timely written notice and his injuries were compensable under § 26 of the Act); Madden's Case, 222 Mass. 487, 498, 111 N.E. 379, 384 (1916) (Workmen's Compensation Act is not compulsory. Employers need not elect it, and employees may choose to stand on their legal rights and forego coverage.); Young v. Duncan, 218 Mass. 346, 106 N.E. 1 (1914) (under Part I section 5 of the Act,

to compensate "personal injury arising out of and in the course of" employment;[34] and to make the cost of personal injuries resulting from employment part of the employer's cost of doing business.[35] Courts have broadly defined "personal injury" as "lesion or change in any part of the system" which produces harm or pain or decreases the natural ability to function.[36]

When it enacted the statute, the legislature followed the English acts of 1897 and 1906[37] in general form and in many particulars[38] but with the significant difference that the English act compensates only "personal injury by accident."[39] Because the Massachusetts Act has no "by accident" requirement, "gradually developed injuries are compensable as well as those caused by sudden incidents."[40] The effect of the distinction can be seen in *Hurle*'s Case,[41] in which the court held claimant's blindness, resulting from long-term, repeated exposures to poisonous coal-tar gases, to be a "personal injury" within the meaning of the Act.[42] The court rejected defense analogies to English case law and arguments that the legislature had not intended to allow recovery for long-range injuries.[43] "Injury" was read as an "inclusive word" that referred not merely to accidents.[44] In *Madden*'s Case[45] the supreme judicial court affirmed a compensatory award for disability due to the effect of hard work on a weak heart and noted that "personal injury" is a broader concept than "personal injury by accident."[46]

The Massachusetts Act thus provides liberal compensation, has no "by accident" requirement, permits compensation for gradually developing injuries, and includes a broad definition of "personal injury." Within this framework, Larson's third category of cases—nervous in-

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employee held to have waived her right of action at common law as she did not give notice in writing of intent to preserve the right when she was hired.)

34. MASS. ANN. LAWS ch. 152, § 26 (Michie/Law. Co-op. 1976).

35. Madden's Case, 222 Mass. 487, 494-95, 111 N.E. 379, 382 (1916).

36. Burns' Case, 218 Mass. 8, 12, 105 N.E. 601, 603 (1914).

37. Workmen's Compensation Act, 1897, 60 & 61 VICT., ch. 37, § 1(1); Workmen's Compensation Act, 1906, 6 EDW. VII, ch. 58, § 1(1).

38. Madden's Case, 222 Mass. 487, 489, 111 N.E. 379, 380 (1916).

39. *Id.* at 490, 111 N.E. at 380.

40. Zerofski's Case, 385 Mass 590, 592, 433 N.E.2d 869, 871 (1982).

41. 217 Mass. 223, 104 N.E. 336 (1914).

42. *Id.* at 227, 104 N.E. at 339.

43. *Id.* at 225-26, 104 N.E. at 338.

44. *Id.*

45. *Madden*, 222 Mass. 487, 111 N.E. 379 (1916).

46. *Id.* at 490, 111 N.E. at 381.

jury caused by mental stimulus[47]—presented special problems. On the one hand, the common law traditionally denied recovery for nervous injuries caused by emotional trauma largely because of the difficulty of establishing emotional distress and the apprehension of "frivolous and fraudulent claims."[48] The court in *Spade v. Lynn & Boston RR.* stated that the difficulty of administering any other system was the real reason for refusing damages for injuries caused by emotional distress.[49] On the other hand, the court had no valid reason to deny recovery for "mental or emotional disorders caused by mental or emotional trauma"[50] in workers' compensation cases.

In *Fitzgibbons' Case*[51] the supreme judicial court, finding the claimant was exposed to extraordinary stress at work,[52] for the first time permitted compensation for a mental disorder causally connected to mental trauma that "arose out of the employment looked at in any of its aspects."[53] The court refined the standard in *Albanese*'s *Case*,[54] requiring two conditions for compensation: first, "identifiable stressful work-related incidents" that occurred over a relatively short time, and second, a "causal nexus" between emotional injury and working conditions.[55] Before *Fitzgibbons*, the court had not focused on the lack of a physical element in the injury. Rather it had denied recovery because there was no evidence connecting the stressful precipitating event to the employment,[56] or because the facts brought the case under the "wear and tear" doctrine.[57] In both *Albanese* and *Fitzgibbons*, the existence of a causal link between the injury and specific

47. *See supra* note 20 and accompanying text.

48. 4A PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES (MB), D. BINDER, FRIGHT, SHOCK, AND EMOTIONAL DISTRESS § 1.02 (L. Frumer ed.1982).

49. 168 Mass. at 288, 47 N.E. at 89.

50. Fitzgibbon's Case, 374 Mass. 633, 638, 373 N.E.2d 1174, 1177 (1978) (citing McMurray's Case, 331 Mass. 29, 116 N.E.2d 847 (1954); 1A LARSON, *supra* note 22, § 42.23).

51. 374 Mass. 633, 373 N.E.2d 1174 (1978).

52. *Id.* at 638, 373 N.E.2d at 1177. Fitzgibbons, a supervisory corrections officer, ordered some prisoners moved. A scuffle ensued in which one officer became ill. He was later pronounced dead. Fitzgibbons became upset, started shaking, and began to cry. Physicians diagnosed his condition as an acute anxiety reaction. He received medication on the initial hospital visit and later from his own physician, but he was unable to work again. He died of a self-inflicted gunshot wound six weeks after the incident. *Id.* at 633, 373 N.E.2d at 1174.

53. *Id.* at 638, 373 N.E.2d at 1178.

54. 378 Mass. 14, 389 N.E.2d 83 (1979). *See supra* note 15.

55. 378 Mass. at 18, 389 N.E.2d at 86.

56. *Fitzgibbons*, 374 Mass. at 639, 373 N.E.2d at 1178.

57. *See, e.g.*, Korsun's Case, 354 Mass. 124, 235 N.E.2d 814 (1968) (court focused on the causal nexus and denied recovery because the employee's death from a heart attack was induced by apprehension over the prospect of losing his job and did not arise "out of the

events at work constituted the significant factor that permitted recovery.[58]

Because no requirement exists in the Act that the work-related injury occur "by accident,"[59] courts developed alternatives to limit liability for gradually developing physical injuries. In 1913 the court narrowed the concept of "arising out of and in the course of employment" by requiring that injury, to be compensable, not only result from conditions at work, but that those conditions be *required* by the work.[60] The doctrine of "wear and tear" originated in 1917[61] and grew out of a narrow interpretation of the statutory language and the concepts of "personal injury" and "arising out of and in the course of employment."[62] The doctrine limited insurers' liability by excluding from the definition of personal injury within the meaning of the Act injuries resulting from long years of hard work.[63] The court apparently abandoned the narrow reading of "arising out of" in 1940,[64] holding that an injury satisfied the requirement if it arose "out of the nature, conditions, obligations or incidents of the employment looked at in any of its aspects."[65] The wear and tear doctrine remained dormant from 1946[66] until 1968[67] when the court revived it in *Begin*'s

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nature, conditions, obligations, or incidents of the employment," (quoting Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940)).

58. *Albanese*, 378 Mass. at 18, 389 N.E.2d at 86; *Fitzgibbon's*, 374 Mass. at 638, 373 N.E.2d at 1177-78. *See also* 1B LARSON, *supra* note 22, § 38.83. Larson identifies the fundamental causation issue as the center of the battle in Massachusetts.

59. "By accident" requirements do not exist in the workers' compensation statutes of only eight states: California, Iowa, Maine, Massachusetts, Minnesota, Pennsylvania, Rhode Island, and South Dakota. 1B LARSON, *supra* note 22, § 37.10 n.1.

60. McNichol's Case, 215 Mass. 497, 102 N.E. 697 (1913) (emphasis added) (injury was noncompensable as it could have been avoided had employee changed his posture at work).

61. Maggelet's Case, 228 Mass. 57, 61, 116 N.E. 972, 974 (1917). *See also* 29 LOCKE, *supra* note 10, § 175.

62. MASS. ANN. LAWS. ch. 152, § 26 (Michie/Law. Co-op. 1976).

63. Maggelet's Case, 228 Mass. 57, 116 N.E. 972 (1917).

64. Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940).

65. *Id.* at 502, 26 N.E.2d at 330. *See also* 29 LOCKE, *supra* note 10, § 175. "The wear and tear cases were productive of much hardship and injustice to the working people of Massachusetts. . . . It was difficult . . . to draw the line between disability resulting from a series of strains, held to be compensable, and those resulting from bodily wear and tear." *Id.*

66. Spalla's Case, 320 Mass. 416, 69 N.E.2d 665 (1946). *See also* 29 LOCKE, *supra* note 10, § 175. *But see* McMurray's Case, 331 Mass. 29, 32-33, 116 N.E.2d 847, 849 (1954) (The court upheld compensation award for a heart attack induced by job-related stress but noted that a line existed between wear and tear cases and those in which an employee received a strain in performing his work). While the line might be difficult to determine, it does exist.

67. Begin's Case, 354 Mass. 594, 238 N.E.2d 864 (1968).

Case[68] for nervous injury cases. The insurers in *Fitzgibbons*[69] and *Albanese*[70] raised wear and tear as a defense but in each case the presence of identifiable triggering incidents permitted recovery. The court strongly reaffirmed the wear and tear doctrine for gradually developing physical injuries in *Zerofski*'s *Case*[71] but noted that the line separating compensable injury and noncompensable injury resulting from "wear and tear" was a "delicate one."[72] Nevertheless the *Zerofski* court believed the line a necessary one to preserve the character of the Act.[73]

The insurer in *Kelly*'s *Case* raised the wear and tear doctrine as a defense[74] and also characterized the employee as a person who collapsed under the ordinary, day-to-day stresses of her work.[75] The appeals court found the arguments unconvincing because there were two "identifiable stressful work-related incidents," which proved a causal nexus and a stress greater than ordinary.[76] The court's approach ignored the fact that mental disease generally cannot be linked to a specific event, resulting rather from the complex interaction of a number of factors.[77] Limiting compensation to cases in which a claimant can identify an abnormally stressful single event may result in an artificial

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68. *Id.*

69. 374 Mass. at 638, 373 N.E.2d at 1177.

70. 378 Mass. at 18, 389 N.E.2d at 86.

71. 385 Mass. 590, 433 N.E.2d 869 (1982).

72. *Id.* at 594, 433 N.E.2d at 871. To qualify for compensation for gradually developing physical injuries, a causal nexus must exist between employment and the injury, but "causation [alone] . . . is an inadequate test" in situations in which any of a number of activities that could have been pursued in the place of employment would have contributed to the injury. *Id.* at 594, 433 N.E.2d at 872. The court restated the range of harm covered by the Act in order to clarify the full analysis necessary for compensability. "To be compensable, the harm must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not . . . result from the fault of the employer. But it must . . . be identified with the employment." *Id.* at 594-95, 433 N.E.2d at 872.

See, e.g., Begin's Case, 354 Mass. 594, 238 N.E.2d 864 (1968); Maggelet's Case, 228 Mass. 57, 116 N.E. 972 (1917); Madden's Case, 222 Mass. 487, 111 N.E. 379 (1916).

73. *Zerofski*, 385 Mass. at 594, 433 N.E.2d at 871.

74. *Kelly*, 17 Mass. App. Ct. at 730, 462 N.E.2d at 350.

75. *Id.* at 729-30, 462 N.E.2d at 350. *See also* Korsun's Case, 354 Mass. 124, 235 N.E.2d 814 (1968) (the insurer denied compensation to an employee whose heart attack was causally related to the employee's fear of losing his job because of an incident at work). Arguably Korsun's case was stronger than Kelly's because the injury was physical rather than emotional. The *Kelly* court rejected the analogy and held that Korsun's Case was inapplicable to the facts in *Kelly*. 17 Mass. App. Ct. at 731, 462 N.E.2d at 351.

76. *Kelly*, 17 Mass. App. Ct. at 732-33, 462 N.E.2d at 351 (quoting *Albanese*, 378 at 18, 389 N.E.2d at 86).

77. *See generally* A. BUSS, PSYCHOPATHOLOGY (1966).

limit on recovery similar to the outdated requirement of physical impact for recovery in emotional distress cases.[78]

The Massachusetts courts have not yet developed a methodology for determining compensability for work-related mental injuries of gradual onset, which is a more intractable problem.[79] Several concerns present themselves. First, a danger exists that courts will lose sight of the purposes of the Act,[80] and that it will gradually become a form of health and accident insurance.[81] Second, a potential exists for large extensions of liability, especially in jurisdictions with no "by accident" requirement.[82] Employers may pass along the resultant higher insurance rates to consumers. Third, mental illness generally results from a variety of causes, only one of which is stress at work. Society may be able to develop more efficient ways to compensate for such injuries rather than labelling them a cost of doing business. Examples include payments under unemployment compensation or social security disability.[83] Fourth, liberal compensation may generate more litigation. Because of the high potential cost of compensation, employers have an incentive to appeal adverse decisions, especially after the strong reaffirmation of the wear and tear doctrine in *Zerofski*.[84] Fifth, employers may be reluctant to hire unstable workers or those with a history of treatment for mental illness because of uncertainty over the extent of liability.[85] Finally, the presence of available compensation may discourage recovery in employees suffering from psychoneurotic injuries. Financial aid, serving as a disincentive to getting well, may lengthen the duration of the psychoneurotic illness and may, therefore, be incompatible with the aim of rehabilitation.[86]

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78. *See supra* notes 26-31 and accompanying text.

79. The courts in *Zerofski*, 385 Mass. at 595 n.3, 433 N.E.2d at 872 n.3; *Albanese*, 378 Mass. at 18 n.4, 389 N.E.2d at 86 n.4; and *Kelly*, 17 Mass. App. Ct. at 731, 462 N.E.2d at 350-51, stated they were not addressing this issue.

80. *See supra* notes 34-35 and accompanying text.

81. *Madden*, 222 Mass. at 494-95, 111 N.E. at 382 ("The act is not a substitute for disability or old age pensions"). *See also* Note, *Determining the Compensability of Mental Disability Under Workers' Compensation*, 55 So. CAL. L. REV. 193 (1981).

82. *See supra* notes 37-46 and accompanying text.

83. *Kelly*, 17 Mass. App. Ct. at 733, 462 N.E.2d at 352.

84. 385 Mass. 590, 433 N.E.2d 869. *See supra* note 72 and accompanying text. *See also* Note, *supra* note 81, at 240-41; 29 LOCKE, *supra* note 10.

85. *See* Note, *supra* note 81, at 244. The author suggests that with issues of mixed causation, the "existence of other factors in a worker's life that contribute significantly to the development of a mental disability should not preclude compensation, but should create a rebuttable presumption on behalf of the employer that the alleged mental disability is not sufficiently work-related to be compensable." *Id.*

86. Cohen, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1146-47 (1961); Note, *supra* note 81, at 240-41.

Massachusetts erected barriers to open-ended liability in the wear and tear doctrine[87] and the requirement of "identifiable stressful work-related incidents" causally related to the injury.[88] The solution is not entirely satisfactory.[89] Larson criticizes the distinction Massachusetts draws between identifiable work related incidents and "gradual stimulus" as "unsound" and an incorrect way of drawing the line.[90] He suggests that a better approach would be to distinguish between "gradual stimuli that are sufficiently more damaging than those of everyday employment life to satisfy the normal 'arising-out-of' test, and those that are not."[91] While the present Massachusetts approach does not explicitly deny compensation to claimants with mental injuries of gradual onset, a claimant's inability to satisfy the *Albanese* test would bar recovery.[92] Larson believes this approach denies compensation to claimants with work-connected injuries who deserve to be compensated.[93]

The *Kelly* court identified the "Wisconsin rule" or "objective test" as the emerging trend.[94] The test asks, first, whether the work environment subjected the claimant to extraordinary stresses and strains, and second, whether the stresses caused the claimant's disability.[95] Because of the unique development of workers' compensation law in Massachusetts, the usefulness to Massachusetts of law from other jurisdictions remains problematical.[96]

The insurer did not convince the *Kelly* court that compensation for mental injuries should be denied because of the difficulty of sub-

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87. *See supra* notes 60-72 and accompanying text.

88. Albanese's Case, 378 Mass. 14, 18, 389 N.E.2d 83, 86 (1979).

89. *See supra* notes 59-76 and accompanying text.

90. 1B LARSON, *supra* note 22, § 42.23[b].

91. *Id.*

92. *Albanese*, 378 Mass. at 18, 389 N.E.2d at 86.

93. 1B LARSON, *supra* note 22, § 42.23[b].

94. *Kelly*, 17 Mass. App. Ct. at 731 n.6, 462 N.E.2d at 351 n.6.

95. Swiss Colony, Inc. v. Department of Indus., Labor & Human Relations, 72 Wis. 2d 46, 50, 240 N.W.2d 128, 130 (1974); School District #1 v. Department of Indus., Labor & Human Relations, 62 Wis. 2d 370, 378, 215 N.W.2d 370, 377 (1974). *See also* 1B LARSON, *supra* note 22, § 42.23[b]; Note, *supra* note 81, at 240. *Cf.* 29 LOCKE, *supra* note 61, at 188. Locke would go further:

> If the employee's disability or death is the result of the general stress of his ordinary work, it is a proper subject for compensation. If . . . it is the result of the general stress of everyday life, to allow compensation would be to convert the act into a scheme of general health insurance. The question should not be one of law, but of fact for the determination of the board.

Id.

96. *See Kelly*, 17 Mass. App. Ct. at 731-32, 462 N.E.2d at 351.

stantiation.[97] In *Zerofski*,[98] the court suggested that a "stricter standard of proof might apply to cases involving gradually developing mental illness."[99] The Maine court developed a possible solution, providing that employees could recover if they could prove either that they experienced greater stresses or tensions than other employees, or by clear and convincing evidence show that the ordinary stresses at work were the principal cause of injury.[100] The *Kelly* court, however, addressed itself less to the problem of gradually developing mental illness and more to the extension of liability that the decision presaged.[101] The court invited the legislature and the supreme judicial court to consider whether employees should recover workers' compensation for mental injury caused by employers' good faith business decisions to lay off or transfer workers.[102] Unless the decision in *Korsun's Case*[103] acts as a barrier, the courts could use the Wisconsin approach,[104] determining whether as a general rule layoffs and transfers are ordinary or extraordinary stress.

IV. CONCLUSION

Kelly's Case is the most recent in a series of cases decided since 1978[105] in which the courts have allowed recovery under the workers' compensation act for mental injury caused by mental stimulus. Two conditions must exist for recovery: (1) an identifiable stressful work-related incident or series of incidents, and (2) causal connection to the injury.[106] The decisions clearly and repeatedly indicate that the Act will not allow compensation for injuries resulting from normal "wear and tear."[107] The remaining issue to be resolved by the Massachusetts courts concerns the ability of employees to recover under the Act for

97. *Id.* at 732, 462 N.E.2d at 351-52.

98. 385 Mass. at 595 n.3, 433 N.E.2d at 872 n.3.

99. *Id.*

100. Pomerleau v. United Parcel Serv., 464 A.2d 206, 208 (Me. 1983) (quoting Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1020 (Me. 1979)).

101. *Kelly*, 17 Mass. App. Ct. at 733, 462 N.E.2d at 352.

102. *Id.*

103. 354 Mass. 124, 235 N.E.2d 814 (1968). "Apprehension over the prospect of losing one's job does not arise out of the nature, conditions, obligations or incidents of the employment. . . . The added emotional distress was . . . a personal idiosyncracy and was not connected with his work." *Id.* at 128, 235 N.E.2d at 816. The court in *Kelly* considered Korsun's Case "to have been limited by later decisions." *Kelly*, 17 Mass. App. Ct. at 731, 462 N.E.2d at 351.

104. *See supra* notes 94-95 and accompanying text.

105. *Fitzgibbons*, 374 Mass. 633, 373 N.E.2d 1174.

106. *Albanese*, 378 Mass. at 15, 389 N.E.2d at 86.

107. *See supra* 61-73 and accompanying text.

mental disorders of gradual onset caused by mental trauma arising out of their employment.

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