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The Treatment of Sexual Impairment Injuries Under Worker's Compensation Laws

By Jack Dittoe*

Introduction

If an employee receives an injury that arises out of and in the course of employment that renders the employee impotent or sterile, permanent disability benefits usually are not awarded. California and most other states award permanent disability benefits only for those injuries which affect the injured worker's earning capacity, and sexual-impairment injuries neither generally cause work-related physical limitations, fall within the generally accepted meaning of "disfigurement", nor cause such serious psychological damage as to permanently impair the injured worker's earning power. Compounding this adverse result is the exclusive-remedy feature of worker's compensation acts which prevents the injured worker from maintaining a tort suit against the employer. Because of this unfortunate combination of factors, the injured employee generally does not recover for the permanent effects of the injury. The worker receives no permanent disability benefits under the compensation act and has no right to sue the employer for damages in a court of law.

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1. See notes 49-59 & accompanying text infra.

2. "Sexual-impairment injuries," as used in this Note, will refer only to those injuries which cause a loss of sexual power (impotence, or sterility). Impotency is defined as inability to complete sexual intercourse. "It may range from some interference with normal sexual activity to a total inability to perform sexually." 6 AM. JUR. Proof of Facts 302 (1960). Sterility refers to an incapacity to produce offspring. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2238 (1966). To facilitate discussion, this Note will refer to such injuries as they affect male workers only. Analogous injuries suffered by women, relating to their inability to engage in sexual activity and reproductive capacity, should be treated similarly.

3. See notes 71-76 & accompanying text infra.

4. See notes 77-95 & accompanying text infra.

5. See notes 96-110 & accompanying text infra.

6. Prior to an amendment in 1974 to article XX, § 21 of the California Constitution, the Worker's Compensation Act was known as the Workmen's Compensation Act. See CAL. LAB. CODE § 3200 (West Supp. 1978).

7. See notes 138-64 & accompanying text infra.

8. This Note will discuss only the remedies available to the worker against the em-
The worker who sustains such an injury may never again lead a full, satisfying life. Sex is a component which most people deem basic to life. The inability to engage in sexual intercourse may cause the injured worker to feel a sense of humiliation, inadequacy, and embarrassment when associating with other workers and friends. Such a loss may also destroy an existing marriage or prevent one from taking place. The worker's realization that he will never have an opportunity to beget and raise his own children may be life shattering. The consequences associated with such injuries are far reaching and one can only speculate as to the severity of the impact on the injured worker's self-esteem and will to live.

This Note discusses and analyzes the treatment of sexual-impairment injuries under worker's compensation laws. For the sake of illustration, primary emphasis is placed on California's handling of this specific type of injury. However, alternative approaches taken by other states are also examined, and the concepts discussed here are pertinent to most states. Part I presents a basic overview of the worker's compensation system. It discusses the historical development of the legislation, the social and economic theories upon which it is based, the conditions that must be satisfied for compensation to be granted, the benefits available to injured workers, and the different theories used to determine the existence and degree of permanent partial disabilities. Part II examines the treatment accorded sexual-impairment injuries in California and various other states. Part III discusses the exclusive remedy feature of the compensation acts and the fairness of the so-called "quid pro quo" with respect to sexual-impairment injuries. Part IV examines proposals which would eliminate or ameliorate the harshness of the current California scheme. The Note concludes that to provide the injured worker with a tort remedy against the employer would be the most equitable solution for all parties.

Overview of the Worker's Compensation System

History

Under the common law, the worker's sole remedy against the employer for work related personal injury was a tort action for negligence. However, because of the expense and time-consuming nature of litigation, the difficulty of proving the employer's violation of due care, and the common-law defenses of contributory negligence, as-
sumption of risk, and the fellow-servant rule, this common-law remedy proved to be inadequate. In fact, it has been estimated that under the common law, seventy to ninety-four percent of industrial accidents went uncompensated. Employer liability acts attempted to remedy these inadequacies by modifying the defenses available to the employer. These acts failed in this attempt because the injured employee was still required to bear the burden of civil litigation and to establish the employer's fault. As stated by a noted authority, "[t]he necessity for workmen's compensation legislation arose out of the coincidence of a sharp increase in industrial accidents attending the rise of the factory system and a simultaneous decrease in the employee's common-law remedies for his injuries." Because the principles of worker's compensation represented such a marked departure from established legal concepts, the courts struck down the first few compensation acts as violative of state and federal constitutions. However, shortly thereafter, they began to take a broader view of the problem, and in 1917 the United States Supreme Court ruled that worker's compensation legislation was constitutional.

California's first worker's compensation law, the Roseberry Act, was passed in 1911. When few employers elected to become subject to its provisions, a compulsory law known as the Boynton Act was enacted in 1913. This act eliminated the element of negligence and

10. Id. § 1.02(3).
12. 2 Hanna, supra note 9, § 1.03(3). Hanna lists the following shortcomings of the employer liability system: (1) insufficient compensation—recoveries were frequently inadequate to make up for the loss incurred; (2) wastefulness of the system—a large percentage of the recovery had to pay for court costs and attorney fees; (3) delays—trials were often very lengthy ordeals while the injured worker's needs were often immediate; (4) antagonism between the employer and employee. Id.
14. 2 Hanna, supra note 9, § 1.04(2)(d).
17. Cal. Stat. 1913, ch. 176, at 279 (repealed 1937). The Boynton Act was enacted pursuant to the authority granted under article XX, § 21 of the California Constitution. Section 21, as later amended in 1918, declared: "The legislature is hereby vested with plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party." Cal. Const. art. 20, § 21. The authority for such legislation is the state's police power. Western Indem. Co. v. Pillsbury, 170 Cal. 686, 694, 151 P. 398, 401 (1915) (citing State v. Clausen, 65 Wash. 156, 177-78, 117 P. 1101, 1106 (1911)); Cal. Lab. Code § 3201 (West 1971). The current worker's compensation act, referred to as the Labor Code, was
divested the civil courts of jurisdiction over industrial injuries.

Rationale of Worker's Compensation Legislation

The common-law remedy of negligence was viewed as inequitable and unsuited to the conditions of modern industry because it involved intolerable delay, caused great economic waste and gave inadequate relief for loss and suffering. 18 Worker's compensation legislation abandoned the legal concept of "fault." Its rationale is that "the cost of the product should bear the blood of the workman." 19 Human accident losses are treated as legitimate costs of production allocated to the employer. The employer then distributes these costs among the consuming public. 20 It is the employment relationship which imposes an obligation upon the employer to compensate employees who have sustained injuries in the course of their work. 21

Worker's Compensation Objectives

The objective of worker's compensation is to protect workers against economic insecurity. It is a scheme designed to replace a part of the earning power of the employee lost by injury or death. As was eloquently stated in *Union Iron Works v. Industrial Accident Commission*, 22

"[T]he primary purpose of industrial compensation is to insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work and also to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor. By this means society as a whole is relieved of the burden of caring for the injured workman and his family, and the burden is placed upon the industry." 23

A compensation award, unlike a tort recovery, does not restore to the


20. Larson states that it is not accurate to say the public ultimately pays the cost of worker's compensation. "[I]t is more precise to say that the consumer of a particular product ultimately pays the cost of compensation protection for the workers engaged in its manufacture." 1 Larson, supra note 13, § 3.20.


22. 190 Cal. 33, 210 P. 410 (1922).

23. Id. at 39, 210 P. at 413. Most writers consider worker's compensation to be social insurance that can be grouped with unemployment insurance and social security. One noted writer stated that "[t]he real characteristic of social insurance is the fact that the worker is entitled to the benefits as a matter of right." Riesenfeld, Forty Years of American Workmen's Compensation, 35 Minn. L. Rev. 525, 530 (1951). Larson disagrees with that analysis and states that unlike social insurance, the operative mechanism of worker's compensation is
Conditions for Compensation

In general, two conditions must be concurrently satisfied to establish a claim under a worker’s compensation act: (1) the existence of an employment relationship; and (2) an injury which arises out of and in the course and scope of employment. A worker is usually considered an employee when he performs services under the control and direction of the employer for a consideration. An injury “arises out of the employment” if it occurs by reason of a condition of or in connection with the employment. An injury occurs “in the course of employment” when the employee is “acting within the scope of his authority or assignment, at a time within the period of his employment, and at a place where he may reasonably be for that purpose.”

unilateral employer liability with no contribution by the employee. 1 Larson, supra note 13, § 1.20.

24. The theory of tort is that the victim will be fully relieved from the detrimental effects of the tortious conduct. Hence, the victim is permitted to receive awards covering expenses for reduction of past and future earnings, physical rehabilitation, medical treatment, pain, humiliation, loss of standing in the community, shock, suffering, and the like. Compensation benefits, on the other hand, “merely aim at an alleviation of the deterioration in the living standards of the victim and his family flowing from the injury.” Riesenfeld, Basic Problems in the Administration of Workmen’s Compensation, 36 Minn. L. Rev. 119, 122 (1952). Amounts for pain and suffering, humiliation, and other social discomforts generally are not included in a compensation award. Pain and suffering are compensable elements only when they impair the injured employee’s ability to work. Jacobsen v. Industrial Accident Comm’n, 212 Cal. 440, 447, 299 P. 66, 68 (1931).

25. 1 Larson, supra note 13, § 2.50.


27. 2 Hanna, supra note 9, § 3.01(1). In California, an employee is defined as “every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.” Cal. Lab. Code § 3351 (West Supp. 1978). There is a presumption that any person rendering service to another, other than an independent contractor, or one who is expressly excluded, is an employee. Cal. Lab. Code § 3357 (West 1971).

28. Madin v. Industrial Accident Comm’n, 46 Cal. 2d 90, 92, 292 P.2d 892, 894 (1945). “Arising out of” refers to the causal connection between the employment and the injury. California has adopted the positional risk theory where “an injury is compensable if it would not have happened but for the fact that the conditions or obligations of the employment put the claimant in the position where he was injured.” 1 Larson, supra note 13, § 6.00.

29. 2 Hanna, supra note 9, § 9.01(1)(b). The words “in the course of employment” generally refer to the time, place and circumstances under which the injury occurs. Id.
Exclusive remedy

When the specified conditions are met, the relief provided by the worker’s compensation act excludes all other statutory and common-law remedies against the employer.\textsuperscript{30} The compensation act provides the only means by which an injured worker can recover from the employer for injuries received in the course of and arising out of the employment. This rule applies even though the claimant may believe that the employer’s negligence can be established, or that it would be more advantageous to maintain an action at law for damages.\textsuperscript{31} In all cases where the conditions of compensation do not concur, the worker’s compensation act does not apply and the employee is free to bring a civil action for damages.\textsuperscript{32}

Injury

An employee who sustains an injury within the scope of the worker’s compensation act has a right to recover compensation.\textsuperscript{33} A blow or other traumatic origin is not required: “Injury under California law may be suffered without the infliction of a flesh wound or other external trauma.”\textsuperscript{34} The term is broad enough to cover injuries sustained through the inhalation or ingestion of invisible poisons, occupational strains, as well as psychic and mental disturbances.\textsuperscript{35}

Compensation Benefits Available to an Injured Worker

Assuming the injury falls within the compensation act’s coverage, there are three general types of benefits available to the worker: (1) medical, surgical, and hospital treatment; (2) temporary total and tem-

\textsuperscript{30} See, e.g., CAL. LAB. CODE § 3601 (West Supp. 1978). For a more in-depth discussion of the exclusive remedy feature, see notes 138-64 & accompanying text infra.


\textsuperscript{32} See, e.g., CAL. LAB. CODE § 3602 (West 1971).

\textsuperscript{33} “Compensation embraces every benefit or payment to which an injured employee is entitled . . . .” Ramirez v. WCAB, 10 Cal. App. 3d 227, 234, 88 Cal. Rptr. 865, 870 (1970).

\textsuperscript{34} 2 HANNA, supra note 9, § 11.01(2) (b); see CAL. LAB. CODE § 3208 (West Supp. 1978). In some states, for an injury to come within the compensation act’s coverage, it must have been sustained by “accident.”

\textsuperscript{35} 2 HANNA, supra note 9, § 11.01(2)(b). “Injury” includes mental as well as physical injury. To the extent that traumatic neuroses are disabling and attributable to the employment, they are entitled to be treated as injuries under the worker’s compensation law. Id. § 11.01(2)(e). See also 1A LARSON, supra note 13, § 42.22. “An injury may be either: (a) specific, occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) cumulative, occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.” CAL. LAB. CODE § 3208.1 (West Supp. 1978).
temporary partial disability indemnity payments; and (3) permanent total and permanent partial disability indemnity payments.

In California, the employee is entitled to full medical benefits in case of an industrial injury. It is the employer’s duty to provide medical, surgical, chiropractic, and hospital treatment, including nursing, medicines and supplies which are reasonably required to cure or relieve the worker from the effects of the injury. If the treatment is reasonably necessary, there are no limitations on the amounts or cost of medical care to be furnished.

In addition to medical benefits, an employee may be entitled to receive temporary or permanent disability indemnity benefits, each of which is designed to compensate for a different type of loss. Temporary disability is defined as “physical incapacity reasonably expected to be completely cured or materially improved with proper medical attention.” Such disability exists during the “healing period” when the employee is recovering from the acute effects of the injury. The payments are intended to act as a replacement for wages that are lost during this “healing period.” Temporary total disability exists when the employee, at the time of payment, is totally incapacitated. Temporary partial disability is present when the injured employee is capable of some type of gainful employment but is unable to earn as much as he had prior to the injury.

“A disability is generally regarded as ‘permanent’ . . . where further change—for better or for worse—is not reasonably to be anticipated under usual medical standards.” In other words, it is a disability which will remain substantially the same during the remainder of the injured worker’s life. Permanent total disability benefits are awarded when the injured worker is precluded from regular work in any well-known branch of the labor market. Permanent partial disability benefits are paid to the injured employee who suffers a per-

37. Id. The employer’s duty to provide medical treatment is not designed as a penalty but rather is a component of the compensation due the injured employee. See Union Iron Works v. Industrial Accident Comm’n, 190 Cal. 33, 40, 210 P. 410, 413 (1922).
38. Temporary disability payments are designed as a substitute for lost wages, while permanent disability payments are meant to indemnify the injured worker for the impairment of earning capacity or diminished ability to compete in the open labor market. Russell v. Bankers Life Co., 46 Cal. App. 3d 405, 416, 120 Cal. Rptr. 627, 633-34 (1975).
39. 2 Hanna, supra note 9, § 13.01(1).
41. 2 Hanna, supra note 9, § 13.01(3).
42. Sweeney v. Industrial Accident Comm’n, 107 Cal. App. 2d 155, 159, 236 P.2d 651, 653 (1951)(quoting 1 Campbell, Workmen’s Compensation § 813 (1955)).
43. Id.
44. 2 Hanna, supra note 9, § 14.01(2)(a). Permanent total disability may be found as a
manent injury but is not totally disabled. The basis for the computation of permanent partial disability benefits is an often elusive and flexible concept called “disability.” Considerable divergence exists among the states as to what types of losses or injuries are compensable and to what extent.45

Theories Used in Determining the Existence and Degree of Permanent Partial Disabilities

Four different theories are used to fix compensation for permanent partial disabilities: (1) actual wage loss; (2) whole man; (3) loss of earning capacity; and (4) dual theory.

“Under the [actual] Wage Loss Theory, compensation for [a permanent] partial disability is payable only when bodily impairment results in loss of wages.”46 If post-injury earnings equal or exceed pre-injury earnings, no “disability” exists despite the permanent effects of the injury, and no indemnity benefits are awarded.

Under the whole man theory, bodily impairment alone is the test of “disability,” irrespective of its effect on the injured worker’s earning power or capacity.47 In other words, one may recover for the physical harm or injury itself, regardless of its economic impact. Under this doctrine, permanent disability benefits are based on the theory that one has a right to remain physically whole.48

The third theory, “loss of earning capacity,” is followed in the majority of jurisdictions.49 This doctrine bases permanent disability indemnity payments on the theoretical effect the injury will have on the matter of law. In California, there is a conclusive presumption that permanent total disabilities will result from the sustaining of certain injuries. CAL. LAB. CODE § 4662 (West 1971).

45. See 2 LARSON, supra note 13, § 57.10.
47. Id. at 158.
48. See Kostida v. Department of Labor & Indus., 139 Wash. 629, 634, 247 P. 1014, 1016 (1926). Though the bodily impairment may not cause a decrease in the employee’s “ability to produce wages in the industrial world, there are other spheres for the employment of human energy, talents and the possession of physical attributes beside the industrial world, into the activity of which the defendant is entitled to bring, possess and enjoy all the physical attributes with which nature endowed him.” Hercules Powder Co. v. Morris Common Pleas, 93 N.J.L. 93, 95, 107 A. 433 (1919). For possible qualifications of this theory in New Jersey, see Barbato v. Alsan Masonry & Concrete, Inc., 64 N.J. 514, 318 A.2d 1 (1974); Kalson v. Star Elec. Motor Co., 15 N.J. Super. 565, 83 A.2d 656 (1951). For further discussion of this matter, see Lefelt, Toward a New Method of Awarding Compensation Benefits: Solving the Permanent Partial Problem in New Jersey, 28 RUTGERS L. REV. 587, 595-600 (1975).
49. See 2 LARSON, supra note 13, § 57.21. Under worker’s compensation, the only injuries compensated, apart from medical benefits, are those which produce “disability” and hence presumably affect earning power. See 1 LARSON, supra note 13, § 2.40.
employee’s future earnings. The determination is based on the extent to which wage earning capacity has been lost, not only now, but throughout the injured employee’s future work life. Consequently, physiological or functional impairment, though always a necessary ingredient of “disability,” is not itself determinative of the existence or extent of a “disability.” In determining the degree of incapacity to earn wages, a number of factors are often considered, such as the injured employee’s physical condition, age, industrial history, education, and ability to obtain suitable employment.

In California, permanent disability has been defined as “any impairment of bodily or mental function which . . . causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market.” Although this statement might suggest that California takes a two-pronged approach, in fact it has embraced the earning capacity theory wholeheartedly. In Marsh v. Industrial Accident Commission, the court stated that “[t]he law does not award compensation for mere pain or physical impairment, unless it is of such character as to raise a presumption of incapacity to earn.” The California courts have also declared that if a worker sustains an injury that does not affect his ability to work, then that worker is not entitled to compensation (apart from medical benefits) for such injury. A noted California writer in this field of law states that the basic premise of worker’s compensation is that compensation is awarded for the disability (diminished employability) which results from an injury.

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50. The fact the worker is actually earning more money subsequent to the injury is irrelevant in the awarding of permanent disability benefits. See Department of Motor Vehicles v. Industrial Accident Comm’n, 14 Cal. 2d 189, 93 P.2d 131 (1939); 2 Larson, supra note 13, § 57.21.

51. “This scheme may not be as liberal as the Whole Man one because theoretically compensation is not allowed for disability which won’t result in lost earnings.” Dahl, Proposals for Uniform Disability Evaluation in Workmen’s Compensation Cases, 5 Forum 156, 158-59 (1970).

52. See, e.g., Ball v. Mann, 75 So. 2d 758 (Fla. Sup. Ct. 1954); Pascoe v. WCAB, 46 Cal. App. 3d 146, 153, 120 Cal. Rptr. 199, 203 (1975).


54. One writer has stated that by virtue of Labor Code § 4660(a), calling for dual consideration of incapacity, it is unnecessary for California courts to adopt one theory of compensation to the exclusion of any other. Whitebook, Permanent Partial Disability Under the Workmen’s Compensation Acts, 28 Iowa L. Rev. 37, 48 (1942).

55. 217 Cal. 338, 18 P.2d 933 (1933).

56. Id. at 344, 18 P.2d at 936.

and not for the physical condition itself.\textsuperscript{58} In other words, the effects of the injury on the employee's working ability is determinative as to whether a "disability" exists.\textsuperscript{59}

The fourth doctrine used to determine the existence and extent of a "disability" is the "dual theory."\textsuperscript{60} The injured worker's medical impairment and lost earning capacity are each established, and compensation is based upon the higher of the two ratings. Under this theory, a worker who sustains an injury that does not affect his employability nevertheless can be compensated.

Scheduled Injuries

Permanent injuries may be classified as scheduled or nonscheduled. All worker's compensation acts contain catalogues or schedules which set forth the amount of compensation to be awarded for the specified injuries.\textsuperscript{61} Scheduled injuries are compensated without regard to actual or potential wage loss; the medical condition alone determines the amount of disability benefits. This is not, however, a departure from the underlying premise of compensation law—that benefits are awarded for loss of earning capacity and not physical injury per se. The schedules represent legislative determinations that the enumerated losses will conclusively impair the earning capacity of claimants so injured.\textsuperscript{62} The schedules are intended to reflect the economic effect of certain specified injuries upon the "average" worker. Whether medical conditions not listed in the schedules constitute "disabilities" is determined by application of one of the theories discussed in the pre-

\textsuperscript{58} 1 S. HERLICK, CALIFORNIA WORKER'S COMPENSATION HANDBOOK § 7.4 (1978).

\textsuperscript{59} Misleading statements concerning this issue can be found in many California cases. An example is State Comp. Ins. Fund v. Industrial Accident Comm'n, 59 Cal. 2d 45, 377 P.2d 902, 27 Cal. Rptr. 702, (1963), where the court stated, "When there has been no loss of a member of the body or loss of its function, it is necessary as a prerequisite to compensation that the injury result in a decrease in earning capacity or the ability to compete in the open labor market." Id. at 52, 377 P.2d at 907, 27 Cal. Rptr. at 707. This Note submits that such statements are not accurate, for compensation is not granted simply upon a showing of a loss of a body member or loss of its function. The claimant must also show that such a loss will diminish his earning capacity. For further discussion of this issue, see Department of Motor Vehicles v. Industrial Accident Comm'n, 14 Cal. 2d 189, 93 P.2d 131 (1939); Greenock v. Drake, 2 Industrial Acc. Comm'n 266 (1915).

\textsuperscript{60} See, e.g., FLA. STAT. ANN. § 440.15(3)(u) (West 1966).

\textsuperscript{61} Statutory schedules were designed to simplify and expedite the administration of worker's compensation and to inject certainty and uniformity of treatment in the proceedings. They also act as guides to the insurance industry in estimating costs, and guides to the injured workers as to the amount of recovery which they may expect to receive. 1 HANNA, supra note 9, § 11.01(1).

In California, "[Labor Code] Section 4660 sets forth the criteria for determining the percentage of permanent disability suffered, and provides for an official schedule which shall be prima facie evidence of that percentage for each injury covered by the schedule." California's unique rating plan operates on the premise that the amount of permanent disability benefits awarded should bear a measurable relation to the loss of earning capacity suffered. Rather than award a financial recompense based solely on the type of injury sustained and the weekly earnings of the claimant, the California plan gives additional consideration to the worker's age and occupation. The California schedule is also singular in that it furnishes only a prima facie guide in the determination of the ratings. It permits evidence to be introduced at the hearing to show that other ratings should have been made. The final determination of the existence and percentage of disability is left to the Worker's Compensation Appeals Board which exercises its discretion in view of all the circumstances.

The preceding section of this Note has given a rough sketch of how the compensation system operates. Discussion will now focus on the main thrust of this Note—the treatment afforded sexual-impairment injuries under worker's compensation laws.

63. See notes 46-60 & accompanying text supra.
64. Department of Motor Vehicles v. WCAB, 20 Cal. App. 3d 1039, 1043, 98 Cal. Rptr. 172, 174 (1971). CAL. LAB. CODE § 4660(a) (West 1971) declares that "[i]n determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market." For a discussion of how the California rating system operates, see S. Herelick, THE CALIFORNIA WORKER'S COMPENSATION HANDBOOK 85-109 (1976).
65. For a discussion of California's rating plan compared with those of other states, see 1 HANNA, supra note 9, § 11.01(3)(a).
66. Id.
67. Id. In most states, flat rate schedules exist whereby a specified number of weeks is provided for the specified losses. 1 HANNA, supra note 9, § 11.01(2). California's rating plan is based on the theory that the injury may be more disabling to persons in one occupation than in another and that the extent of disability will vary with the age of the injured worker, the power of rehabilitation being considered greatest during youth and declining with age. 1 HANNA, supra note 9, § 11.01(3)(a).
Sexual-Impairment Injuries Under Worker's Compensation Laws

California Law

As previously noted, under California worker's compensation law, permanent disability benefits are not awarded for physical injuries per se. The impairment must be such as to raise a presumption of incapacity causing a loss of earning power. Because injuries that result solely in impairment of sexual power do not generally cause physical limitations for work, nor cause "disfigurement," employees who sustain such injuries must generally show psychological damage to receive permanent disability benefits in California. The following discussion will focus on two main areas of concern: (1) the physical impairment and disfigurement associated with sexual-impairment injuries and the likelihood of permanent disability benefits being awarded for "physical disabilities"; and (2) the emotional and psychological problems connected with such injuries and the willingness of judges to award compensation benefits for "psychiatric disabilities."

Physical Disability and Disfigurement

At present, there is no California permanent disability scheduled rating for impairment of sexual function or sterility. Hence, such injuries necessitate "judgment ratings," to be made pursuant to California Labor Code section 4660(a). The major factors in determining permanent disability ratings under that section are loss of earning capacity and occupational handicap. It is generally agreed in California that loss of sexual function (impotence), injury to the penis, or loss of one testicle do not presumptively diminish the injured employee's

70. See notes 53-59 & accompanying text supra.
71. For a discussion of nonscheduled disabilities, see 1 HANNA, supra note 9, § 17.04(2)(d). The rating schedule was not intended to be complete. Omission of an injury from the schedule does not signify that it is not ratable. Injuries not enumerated in the schedule require nonscheduled ratings or judgment ratings which are determined by comparing the particular condition under consideration with the scheduled disability most nearly analogous to it or by comparing the entire scheme of schedule disabilities with the injury in question. Id. § 11.01(6).
72. CAL. LAB. CODE § 4660(a) (West 1971).
73. See Lewallen v. Industrial Accident Comm'n, 5 Cal. Comp. Cases 186 (1940). In Lewallen, an employee sustained an industrial injury which resulted in painful coitus. The Commission included sexual impairment in the factors of permanent disability rating, but held that none of the factors were such as should seriously interfere with the employee's ability to work or compete in an open labor market.
75. See Curry v. Permanente Metals Corp., 10 Cal. Comp. Cases 255 (1945). "Medical opinion almost universally states that the loss of one testicle is not a disability and that it causes no effect on earning capacity or normal habits of life." Id. at 255 (emphasis added).
earning capacity, and therefore, without more, do not constitute "disabilities." 76

"Disfigurement" is another factor to be considered in determining the existence and degree of a permanent disability in California. 77 Disfigurement is defined as "[t]hat which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner." 78 The justification for disfigurement compensation in California is a presumption that the injury will ultimately impair the employee's earning capacity by making it more difficult for that employee to obtain and retain employment. 79 In other words, such an injury diminishes the injured worker's ability to compete in the open labor market.

A North Carolina court stated this conclusion well when it declared, "A serious disfigurement is [one] that mars and hence adversely affects the appearance of the injured employee to such extent that it may reasonably be presumed to lessen his opportunities for remunerative employment and so reduce his future earning power." 80 In many states, only those disfigurements ordinarily exposed, such as on the face, head, neck, forearms, or hands are compensable. 81 Other states are more liberal in their approach and permit indemnity benefits to be

The Commission differentiated the loss of one testicle from the loss of two. Losing both testicles may cause a change in the secondary sex characteristics such as voice, strength and other features which do affect working capacity, whereas "[t]he loss of one testicle is not followed by any change in the physiological condition of the individual or in his ability to procreate." Id. at 255-56. The court lists a number of cases in which workers who have lost both testicles have been granted permanent disability benefits. In those cases, there was evidence of actual disabilities.

76. "[L]oss of sexual function in itself does not affect the body strength or cause physical limitation for work." E. McBride, Disability Evaluation and Principles of Treatment of Compensable Injuries 498 (6th ed. 1963). One possible exception to this general rule would be the situation involving a pornographic movie star who as a result of the injury became physically unable to perform or to perform with the same degree of proficiency. This situation would represent the rare set of circumstances where the physical effects of such an injury would actually diminish the worker's earning capacity.

77. CAL. LAB. CODE § 4660(a) (West 1971). See note 64 supra.

78. BLACK'S LAW DICTIONARY 554 (4th ed. 1968). The writer could find no California cases precisely defining the term "disfigurement." But see text accompanying notes 84-86 infra.

79. See Greenock v. Drake, 2 Industrial Acc. Comm'n 266, 268 (1915); 2 Larson, supra note 13, § 58.32.


81. See, e.g., Dombrowski v. Fafnir Bearing Co., 148 Conn. 87, 167 A.2d 458 (1961); 2 Larson, supra note 13, § 58.32, at 236-37. Under many of these statutes, the claimant does
granted for disfigurement of bodily areas normally covered by clothing. These awards are based on the theory that such deformity or scarring will be discovered upon a physical examination with the subsequent possibility that it will thereby diminish earning capacity. There are states that go even further and grant compensation when the usefulness of a physical function is impaired.

In *Williams v. State Compensation Insurance Fund*, a California case involving injury to an employee's genitalia, the court discussed the claimant's failure to raise the issue of disfigurement. The court stated that whether disfigurement in California "requires visible mutilation or, on the contrary, comprehends a functional impairment without external manifestations, is an open question." In response to this query, one must examine the definition of "disfigurement," the rationale and purpose of disfigurement compensation and the permanent disability rating schedule in California.

Disfigurement, by its very definition, connotes external manifestations. Descriptive terms such as "impairing the beauty or appearance" and "rendering unsightly" cannot realistically be applied to injuries that cause no visible deformity, even though such injuries may impair physical functions.

Because the concept of worker's compensation in California rests upon the principle of loss or impairment of earning capacity, disfigurement within the contemplation of the Act also is related essentially to earning capacity. To be compensable in California, an injury must have the theoretical effect of diminishing the worker's ability to compete in the open labor market. The injury may have such an effect by:

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82. See, e.g., Bethlehem Steel Co. v. Wilson, 210 Md. 568, 124 A.2d 249 (1956). The court in this case also stated that there are very few parts of the body not exposed in today's world and cited recreational activities that are often a part of employment programs. Because these disfigurements would be exposed in the locker room, the court felt they could thereby impair earning capacity. *Id.* at 575, 124 A.2d at 252. A New Jersey court stated that it could not perceive any "distinction between a normally visible, non-disabling disfigurement and one which is normally concealed, non-disabling, but of such nature and extent that it would be revealed by the customary, pre-employment physical examination. Both types possess the inherent capacity to impair future earning capacity." Wright v. Purepac Corp., 82 N.J. Super. 100, 109, 196 A.2d 695, 700 (1963).

83. See notes 78-80 & accompanying text *infra.*
(1) causing the worker to be less able to function physically in an employment or work capacity (e.g., loss of an eye, leg, finger); (2) causing the worker to suffer psychological problems that hamper the worker's ability to work; or (3) leaving visible deformity or otherwise marring the appearance of the person (e.g., scarring or burning). An injury that causes impairment of a physical function may not necessarily embody visible mutilation, while an injury resulting in deformity or scarring does not imply impairment of a physical function. These concepts compensate for different elements of damage. Impairment of a physical function is relevant in determining the existence of a "disability," but should be of no significance in ascertaining whether "disfigurement" has occurred. An injury which causes no visible deformity can diminish earning power, but it cannot do so by rendering the person "unsightly."

The permanent disability rating schedule in California has a specific provision for cosmetic disfigurement and impairment of function of the face and head. This inclusion of facial disfigurement is consistent with the notion that disfigurement requires visible mutilation, for such injuries are normally visible and do tend to diminish a person's marketability. There is no provision for disfigurement of other parts of the body in the California rating schedule, for as Hanna notes, they rarely prove to be handicaps. However, the absence of a provision for disfigurement of the body in the California schedule does not conclusively foreclose disability benefits for such injuries. It merely means there is no presumption that body disfigurement will impair the worker's ability to compete in the open labor market. A claimant must, therefore, establish that the disfigurement has had or will have such an effect before compensation will be awarded.

In addition to the above factors, there are no California cases that have used disfigurement as the basis on which to compensate injuries

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88. For example, an employee inhales toxic substances while at work which render him sterile. No visible mutilation results, in spite of the physical impairment. Here there is no "disfigurement" within the general meaning of the word.

89. For example, a worker receives a severe cut on the forehead requiring stitches and which thereby results in scarring. There is cosmetic disfigurement, but no impairment of a physical function.

90. Mr. D. Gaines, a disability evaluator for the California Worker's Compensation Appeals Board in San Francisco, concurs in this conclusion. Interview with D. Gaines in San Francisco, California (October 20, 1978).

91. For a discussion of disfigurement, see 1 Hanna, supra note 9, § 11.02(4)-(5); 2A Larson, supra note 13, § 65.30.

92. Permanent Disability Rating Schedule, Disability No. 4 (compiled and published by Division of Industrial Accidents of the Department of Industrial Relations of the State of California)(on file at San Francisco office, Division of Industrial Accidents).

93. 1 Hanna, supra note 9, § 11.02(4).

94. See id. § 11.01(6).
that impaired physical function but which did not entail visible deformity. Apparently, therefore, external mutilation or other impairment of appearance is mandated in order for the claimant to come within the meaning of disfigurement in California. Assuming such a conclusion is correct, it appears that sexual-impairment injuries are not compensable on a disfigurement theory in California. First of all, such injuries may not leave scarring, mutilation or deformity. However, assuming that visible mutilation of the genital area does result, the worker must still clear the seemingly insurmountable hurdle of demonstrating that the injury will cause him to suffer a diminution in earning capacity.95

Psychiatric Disability

Because an injury to the genitalia causing loss of sexual power or sterility will not normally impair the worker’s physical ability to work, nor come within the meaning of disfigurement, it becomes necessary to examine the injured worker’s mental or emotional response for the existence of a possible psychiatric disability. As stated earlier, an “injury” under California worker’s compensation law includes mental as well as purely physical injuries.96 When an employee sustains a traumatic neurosis97 or psychosis98 as a result of an injury, it is commonly held in California and elsewhere that the effects of the neurosis or psychosis are fully compensable.99

It has been said that injuries to the genitals are more likely than others to lead to disabling emotional disorders.100 Several California cases have discussed the issue of “psychiatric disability” in connection

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95. However, if California were to adopt the liberal theory used in Maryland and New Jersey to find loss in earning capacity, see note 79 & accompanying text supra, then sexual impairment injuries which involved visible mutilation of the genital area would come within the meaning of disfigurement.

96. See notes 34-35 & accompanying text supra.

97. Neuroses interfere with the person’s capacity to function at optimum productivity. Anxiety is the main characteristic of neuroses. The person may experience difficulty in sleeping, depression, loss of appetite, and excessively worry about the effects of the injury. There are eight subtypes of neuroses: (1) anxiety; (2) phobic; (3) depressive; (4) hysterical; (5) depersonalization; (6) obsessive-compulsive; (7) neurasthenic; and (8) hypochondriacal. Speech by M. Goldfield, M.D. (Feb. 22, 1975) reviewed in 3 CAL. WORKERS’ COMP. REP. 56 (1975).

98. Psychosis “is a mental disorder in which mental capacity, response, ability to recognize reality, ability to communicate, and ability to relate to others are impaired enough to interfere with capacity to deal with the ordinary demands of life.” Id. at 57. “The most important characteristic of psychosis is its interference with the person’s ability to perceive reality.” Id.

99. See 1B LARSON, supra note 13, § 42.22; 2 HANNA, supra note 9, § 11.01(2)(e).

100. See generally speech by M. Goldfield, M.D. (Feb. 22, 1975), reviewed in 3 CAL. WORKERS’ COMP. REP. 56 (1975). Dr. Franklin Drucker states that the genitals are central to the personality. Id. at 57.
with sexual-impairment injuries. A 2 ½% permanent disability rating for loss of one testicle was granted in Curry v. Fireman's Fund Indemnity Co. The award was based on a finding of a very slight neurosis and what the Commission termed, the employee's "psychic fears." Frieson v. WCAB involved a claimant whose sexual organ was injured. The Board held that no disability resulted therefrom, though there was conflicting testimony by expert witnesses concerning the existence of a traumatic neurosis. In Diaz v. WCAB, the claimant suffered a back injury and a moderate neuropsychiatric impairment, of which sexual impotence was the most annoying element. The referee held that because impotence was the primary complaint, the psychiatric disability would be slight to moderate, rather than moderate. Lewallen v. Industrial Accident Commission concerned a claimant who was rendered impotent. The Commission concluded that sexual impairment would not seriously diminish the injured worker's earning capacity. Notwithstanding these statements and the absence of any evidence of a psychiatric disability, the Commission awarded a 22% permanent disability rating of which 5% was attributable to the genital-urinary condition.

The conflicting interests associated with the compensation of sexual-impairment injuries become apparent in this area of psychic disabilities. Compensation judges realize that workers who receive such injuries suffer great personal losses that are noncompensable under the worker's compensation system. Rather than deprive workers who have sustained sexual-impairment injuries of any monetary recovery, the prior cases demonstrate that judges will at times award permanent dis-

101. 10 Cal. Comp. Cases 255 (1945). A 2 ½% rating entitles the injured worker to approximately $500. Such compensation most likely represents a sympathy award, or as Larson phrases it, a "let's-give-the-poor-guy-something" type award. 2 LARSON, supra note 12, § 57.10.

102. 10 Cal. Comp. Cases 260.


105. 2 CAL. WORKMEN'S COMP. REP. 5 (1974). The editor's note following the review of Diaz states that the case impliedly holds that impotence is a ratable factor in determining permanent disability. Contra, 1 HANNA, supra note 9, § 11.02(5).

106. 5 Cal. Comp. Cases 186 (1940).

107. Id. at 187.

108. It is unclear from the reported decision whether there was evidence of an emotional disorder; whether the judge presumed a very slight neurosis would develop in the future; or, whether the benefits were awarded so that the claimant would not be denied any recovery. It is hard for judges, being human, not to award compensation for the physical injury itself, especially when the injury causes no loss of earning capacity and the claimant is denied a common-law remedy. Whitebook, Permanent Partial Disability Under the Workmen's Compensation Acts, 28 IOWA L. REV. 37, 45 (1942).
ability benefits based on supposed findings of psychic disabilities.\textsuperscript{109} No figures are available that reveal what percentage of workers who sustain sexual-impairment injuries receive indemnity benefits. The cases do indicate, however, that when psychiatric disabilities are found to exist, the amount of compensation awarded is minimal. The trivial amount of compensation granted and the weak evidence manifesting the existence of emotional disorders leave strong doubts as to the bona fide nature of the psychiatric disabilities. These awards cannot easily be attacked because of the difficulty of refuting the existence of neuroses or psychoses and the fact that the existence of such psychiatric disabilities is a question of fact for the compensation judges.\textsuperscript{110} Such a practice, however, represents a circumvention of the worker's compensation scheme and demonstrates the need for change in this area.

Other States

States other than California take differing approaches toward sexual-impairment injuries. These states may be categorized into three distinct groups. The first group consists of states which use the loss of earning capacity theory in determining the existence and degree of permanent disabilities and which have no schedule provisions that enable the awarding of permanent disability benefits for this type of injury. In the second group are states which use the loss of earning capacity theory in determining disabilities but which have attempted to ameliorate or eliminate the usual harsh result that is associated with these nondisabling injuries by the enactment of schedule provisions. The third group is comprised of states which have adopted the whole-man theory in determining the existence and extent of permanent disabilities.

Those states which use the loss of earning capacity theory in determining disabilities and which have no schedule provisions covering this particular type of injury usually deny permanent disability benefits for sexual-impairment injuries. For example, in Heidler v. Industrial Commission\textsuperscript{111} the Arizona Court of Appeals stated, “[W]e find it extremely unlikely that sexual impotence alone could result in a loss of earning capacity\textsuperscript{112} since in “all probability there would never be a loss of earning capacity in the future stemming from the condition itself.”\textsuperscript{113} The result is identical when workers sustain injuries causing a

\textsuperscript{109} Conversations with attorneys and judges practicing in this area of the law confirm this view.

\textsuperscript{110} See 1 Hanna, supra note 9, § 11.02(2)(b)-(c); 2 Hanna, supra note 9, § 14.01(2)(d).

\textsuperscript{111} 14 Ariz. App. 280, 482 P.2d 889 (1971).

\textsuperscript{112} Id. at 281, 482 P.2d at 890.

\textsuperscript{113} Id. See also Traders & Gen. Ins. Co. v. Rockey, 278 S.W.2d 490 (Tex. Civ. App. 1955); Hyett v. Northwestern Hosp., 147 Minn. 413, 18 N.W. 552 (1920).
loss of use of one testicle. The court held that the claimant's earning power was diminished by the loss of sexual power because he would no longer be able to function in a competitive atmosphere.

The second group of states includes those which deal with this type of injury without disrupting the normal compensation disability concept, by enacting appropriate schedule provisions. These provisions are of two types: (1) disability clauses applicable specifically to sexual-organ injuries; and (2) residual, catchall clauses applicable generally to miscellaneous injuries. Under these schedule provisions, the injury is compensated without regard to its effect on earning capacity. The claimant need not be concerned with making a showing of a psychiatric disability because the physical impairment itself permits the recovery of indemnity benefits.

Mississippi's approach exemplifies the first type of legislation. In 1958, Mississippi made loss of testicles and female breasts scheduled injuries. This legislation appears to be a response to a case decided a year earlier in which an injured worker was denied permanent disability benefits for loss of one testicle because he could not establish a dimi-

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115. 143 So. 2d 13 (Fla. 1962).

116. Id. at 15-16. Two other cases have also recognized the possibility of psychiatric disabilities being suffered as a result of sexual-impairment injuries. The dissent in Walk v. State Compensation Comm'r, 134 W. Va. 223, 58 S.E.2d 791 (1950), declared: "[T]here is a strong inference that [the] claimant will develop a psychological neurosis occasioned by his impotency. Such a result would seem . . . natural, considering the nature of [the] claimant's injury." Id. at 232, 58 S.E.2d at 796 (Lovins, Pres., dissenting). In Standard Acc. Ins. Co. v. Industrial Comm'n, 66 Ariz. 247, 186 P.2d 951 (1947), the court denied permanent disability benefits to an employee who sustained an injury to one testicle. The court stated, however, that if the claimant had suggested that he had suffered a psychiatric disability, then it would have been inclined to agree. Id. at 252, 186 P.2d at 954.

117. See notes 61-63 & accompanying text supra.

A presumption that such losses diminish earning capacity is questionable in light of medical opinions and cases mentioned above. The Mississippi legislature apparently made a policy choice and determined that the state interest in granting some relief for the injuries outweighed the interest in strictly adhering to the loss of earning capacity principle.

In contrast to the limited scope of the Mississippi statute, other states have enacted broad, catchall schedule provisions which permit the granting of permanent disability benefits for loss of or loss of use of a member of the body or impairment of the usefulness of a physical function. These catchall provisions generally require the injured employee to be unable to receive permanent disability benefits under any other provision or section of the Act. In Delaware, the worker's compensation board is granted discretionary power to award equitable compensation for the loss of or loss of use of any member of the body. Under this provision, workers who have suffered loss of testicles or loss of use of sexual organs have been awarded permanent disability benefits. A Louisiana statute allows permanent disability compensation to be awarded for injuries which impair the usefulness of a physical function. An employee who loses the use of any portion of the body will be entitled to receive permanent disability benefits in Oklahoma. North Carolina considers "loss of or permanent injury to any important external or internal organ or part of the body" sufficient for an award of permanent disability compensation.

The justification for these catchall provisions is a presumption that losses of bodily function will ultimately impair the earning capacity of

119. See Jones v. Mason & Dulion Co., 229 Miss. 638, 91 So. 2d 715 (1957).
120. See note 114 supra.
121. See 2 Larson, supra note 13, § 58.32.
124. La. Rev. Stat. Ann. § 23:1221(4)(p) (West Supp. 1978) provides as follows: "In cases not falling within any of the provisions already made, where the employee is seriously permanently disfigured about the face or head, or where the usefulness of a physical function is seriously permanently impaired, the court may allow such compensation as is reasonable and in proportion to the compensation hereinabove specifically provided in the cases of specific disability . . . ."
the injured worker. Such legislation is therefore superficially consistent with the basic premise of worker’s compensation—to award permanent disability benefits only for those injuries which impair earning capacity. However, language in some decisions under such statutes casts doubt upon the validity of this explanation. In Barr v. Davis Bros. Lumber Co. the Louisiana Supreme Court stated that the legislature realized nondisabling injuries would occur. Rather than deprive the injured worker of all legal recourse, the legislature felt it just to allow the worker to have the right to compensation in such cases. The court in Wilson v. Union Indemnity Co. was equally explicit when it declared that the catchall provision was designed to fill a void in the law. The court stated that the provision was not strictly compensatory but instead was in the nature of a tort remedy for a personal injury not affecting earning capacity.

The final group of states have abandoned the earning capacity principle and adopted the whole-man theory in determining the existence and extent of permanent disabilities. New Jersey is viewed as the leading exponent of this doctrine, which “challenges the classical compensation dictum that awards should not be for physical injury as such.” Compensation “is not based upon the interpretation of the word ‘disability’ in its narrow sense indicating impairment of working or earning capacity. It is based rather upon a broad interpretation connoting the loss of any physical function or any impairment to the worker as a physiological unit.” States using the whole-man theory

128. 183 La. 1013, 165 So. 185 (1935).
129. Id. at 1023-24, 165 So. at 188.
130. 150 So. 309 (La. Ct. App. 1933).
131. Id. at 310.
132. Id. at 312. “[T]here is no basis in the philosophy or purpose of workmen’s compensation for making nonfault awards which bear no relation to earning capacity merely because the claimant has suffered some . . . kind of loss which arouses one’s sympathy.” 2A Larson, supra note 13, § 65.30. Many writers note that the trend in jurisdictions using the earning capacity theory has been to place increasing reliance on the criterion of physical impairment per se. See M. Berkowitz, Workmen’s Compensation—The New Jersey Experience 78 (1960). There are divergent views on the theoretical justifications of schedule injuries. Employers insist they must be based upon presumptive loss of earnings, while labor maintains that a worker has a basic human right to compensation for loss of a bodily member or its function, even if no loss of earning power results. H. Somers & A. Somers, Workmen’s Compensation 277 (1954). The trend is in the direction of labor’s position.
133. See notes 47-48 & accompanying text supra.
134. Other whole man states are Missouri, West Virginia and Wisconsin. See note 48 supra for possible qualifications of this doctrine in New Jersey.
135. 2 Larson, supra note 13, § 57.10.
award permanent disability benefits to workers who sustain injuries to their sexual organs.137

Exclusive Remedy

In view of the fact that sexual-impairment injuries do not generally qualify for permanent disability benefits, the validity and applicability of the doctrine which makes worker's compensation the exclusive remedy against the employer is questionable.

A component of all worker's compensation plans is a provision which declares that when the employer and employee operate under the worker's compensation Act, and the employee sustains an injury that falls within the act's coverage formula, the remedy provided thereunder shall be exclusive of all other statutory and common-law remedies.138 The remedy is exclusive not only as to the employee, but as to all claiming through him. Hence, the worker's compensation act may not be circumvented by actions for loss of consortium.139 Where the injury fails to come within the purview of the Act, as when the requisite employment relationship does not exist, or when the injury fails to arise out of or in the course of employment, the common-law remedy is not affected and a suit for damages may be maintained.140 Under these circumstances, the injured worker has no right to receive any compensation benefits whatsoever. Therefore, a damages suit can be justified by reasoning that the legislature could not have intended to destroy common-law rights of action without substituting statutory remedies.141

137. See, e.g., Kostida v. Department of Labor & Indus., 139 Wash. 629, 634, 247 P. 1014, 1016 (1926) (permanent disability benefits awarded for loss of one testicle on the ground that everyone "has a right to remain in possession of all those useful members of his body which are provided by nature"); Hercules Powder Co. v. Morris County Ct. of C.P., 93 N.J.L. 93, 107 A. 433 (1919) (indemnity benefits awarded for loss of one testicle).

138. See notes 30-32 & accompanying text supra. Two code sections in California state the exclusive remedy provisions. See CAL. LAB. CODE §§ 3600-3601 (West 1971 & Supp. 1978). Section 3706 creates an exception where the employer fails to secure compensation insurance. Another exception is the "dual capacity doctrine" under which the employee is entitled to recover damages as well as compensation benefits for injuries subject to the compensation law. 2 HANNA, supra note 9, § 22.03(4). Under this doctrine, the employer is treated as a third party.


140. See CAL. LAB. CODE § 3602 (West 1971).

141. See 2A LARSON, supra note 13, § 65.10. In states where occupational diseases are
The removal of the worker's common-law rights has been upheld as a reasonable exercise of the state's police power on the theory that worker's compensation acts set aside one body of law affecting liability and insert another, thereby effecting a trade. This "quid pro quo" is viewed as a compromise which "imposes reciprocal concessions upon employer and employee alike, withdrawing from each certain rights and defenses available at common law." However, as Larson states, if this is the justification for the exclusive remedy rule, it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

The courts universally have held that when injuries causing sexual impairment fall within the compensation act's coverage, the remedy provided thereunder is exclusive, even though little or no compensation may actually be forthcoming. The absence of compensation for non-disabling injuries is considered part of the "quid pro quo" for certainty of recovery for disabling injuries.

*Hyett v. Northwestern Hospital* is a leading case dealing with this problem. There the claimant sustained an industrial injury which rendered him impotent. He brought an action for damages against his employer, contending that the compensation act did not provide a remedy for that particular injury. The court disallowed the suit on the ground the worker's compensation plan represented a reciprocal exchange of benefits by both employer and employee. The court stated, "In consideration of this insured compensation and protection by the acceptance of the act, [the worker], by necessary implication, relinquishes his common-law remedies, and thus places a limit on his rights to that measured and granted by the compensation act."

California has adopted this view, and a court of appeal has held that not compensable because they do not constitute an "accidental injury," the common law remedies are not barred because the injury does not fall within the Act's coverage. *Id.*


144. 2A LARSON, supra note 13, § 65.10, at 4. It is unclear whether the "something of value" which Larson speaks of, refers to permanent disability indemnity benefits, or includes medical treatment and/or temporary disability indemnity benefits.

145. *See*, e.g., Posegate v. United States, 288 F.2d 11 (9th Cir.), *cert. denied*, 368 U.S. 832 (1961); *Smith v. Baker*, 157 Okla. 155, 11 P.2d 132 (1932); *Frese v. John Morrell & Co.*, 58 S.D. 634, 237 N.W. 886 (1931). *Contra*, Boyer v. Crescent Paper Box Factory, 143 La. 368, 78 So. 596 (1918). This last case proceeded on the theory that there should be no wrong without a remedy. It has been criticized and rarely, if ever, followed.

146. 147 Minn. 413, 180 N.W. 552 (1920).

147. *Id.* at 415-16, 180 N.W. at 553.

148. *Id.* at 415, 180 N.W. at 553.
notwithstanding the fact that little or no occupational handicap may result from an injury causing sexual impairment, the door to tort recovery is not thereby opened.149

In *Moushon v. National Garages, Inc.*,150 the claimant became impotent as the result of an industrial injury. The Illinois court concluded, in dictum, that even if the injury was not compensable under the permanent disability provision of the statute, a common-law action would still be barred because the claimant had received compensation benefits under the act in the form of medical treatment and temporary disability payments.151 The court held that the exclusive remedy provision was predicated upon the worker's injury being covered by worker's compensation provisions and not upon receiving compensation benefits for the permanent effects of the injury.152

*Moushon* held that a common-law action against the employer would be barred if the claimant received any compensation. Other courts have held the receipt of compensation benefits is immaterial in determining whether a damages action may be maintained. What they consider crucial is whether the injured worker had a *right* to receive any compensation. The court in *Frank v. Anderson Brothers*153 stated that the right to receive medical treatment constituted compensation within the meaning of the Act.154 Under this rationale, a worker who sustains an injury that falls within the Act's coverage formula is precluded from bringing a tort action against the employer, regardless of the fact that the future receipt of compensation is unlikely. This interpretation is consistent with California Labor Code section 3601, which declares that the *right* to receive worker's compensation shall be the exclusive remedy for the employee's injury.155

However, a vigorous dissenting opinion in *Moushon v. National Garages, Inc.*156 did not accept this conclusion. It recognized the ineq-

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150. 9 Ill. 2d 407, 137 N.E.2d 842 (1956).
151. *Id.* at 410-11, 137 N.E.2d at 844.
152. *Id.*
153. 236 Minn. 81, 51 N.W.2d 805 (1952).
154. *Id.* at 84, 51 N.W.2d at 807.
155. CAL. LAB. CODE § 3601 (West Supp. 1978). "[A] right is generally a claim which the law will enforce, while a remedy refers to the judicial means by which it is made effective." Azevedo v. Abel, 264 Cal. App. 2d 451, 454, 70 Cal. Rptr. 710, 712 (1968) (citations omitted). Labor Code § 3601 would appear to manifest a clear legislative intent to not allow a damages action, even if the injured worker will never actually receive compensation. An example is a case where a worker is rendered sterile because of inhalation of toxic substances. No medical treatment is needed and the worker loses no time from work. The worker is precluded from maintaining a tort action against his employer because he had a *right* to receive compensation benefits, even though that right may never in fact materialize.
156. 9 Ill. 2d 407, 413, 137 N.E.2d 842, 845 (1956) (Bristow, J., dissenting).
uty in denying any recovery for the permanent effects of nondisabling injuries. Justice Bristow declared that if the exclusive remedy feature bars an injured employee's common-law action, while at the same time providing no compensation award for the permanent injury sustained, then the worker's compensation act violates due process guarantees of the Constitution. Justice Bristow's proposed solution was as follows: If an employee sustains an injury for which no permanent disability benefits are provided under the compensation act, then a common-law damages action should be permitted. If, however, benefits are provided under the Act for the permanent injury sustained, then, even though there are elements of damage such as pain and suffering for which no compensation is provided, no negligence action could be brought. Justice Bristow declared that the intent of the exclusive remedy feature was to abolish common-law remedy actions only when a substitute remedy of compensation, such as permanent disability benefits, is provided under the Act for the particular injury sustained. He was aware that allowing a tort remedy would tend to nullify the objectives of worker's compensation by subjecting the employer to both tort damages and compensation. However, Justice Bristow felt that to deprive the worker of any remedy was too harsh and contrary to the public policies underlying the compensation legislation and that the additional tort remedy was warranted.

Case law suggests several reasons why Justice Bristow's view has not been adopted—fear that such a rule would open the door to double litigation in a great number of cases; the belief that personal injuries constitute but one right of action that cannot be divided into several different parts; a hesitancy to violate the clear manifestation of legislative intent expressed in the exclusive remedy provisions; and the be-

157. *Id.* at 419, 137 N.E.2d at 848. "Ours is a government of constitutional limitations; of checks and balances. Our system does not tolerate unrestrained overriding of the rights of individuals in the name of the police power." Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 219 Cal. App. 2d 634, 640, 33 Cal. Rptr. 442, 446 (1963).

158. 9 Ill. 2d 407, 418, 137 N.E.2d 842, 848. The opinion cited with approval Larson's proposal of permitting common-law negligence actions for such nondisabling injuries. *Id.* at 417-18, 137 N.E.2d at 847-48 (citing Larson). Larson states that such losses as impotency and loss of child-bearing capacity should not go unremedied. He further states that if a legislature sets out to undo the injustice of denying a remedy for such losses, it would do better to restore the common-law remedy than to award compensation in violation of the basic premise of workers' compensation—the loss of earning capacity principle. 2A LARSON, supra note 13, § 65.30.

159. 9 Ill. 2d 407, 418, 137 N.E.2d 842, 848.

160. *Id.* at 414, 137 N.E.2d at 846.

161. *Id.* at 418-19, 137 N.E.2d at 848.


believed that if such a change is warranted, it should come about by legislation and not through the courts.164

Solutions to the Problem

This Note has surveyed the present state of the law regarding industrial injuries that cause sexual impairment. Consideration will now be given to changes and improvements that could be made in the California law to rectify the harsh result that usually accompanies such injuries. There is an understandable human pressure to compensate sexual-impairment injuries that may have life-shattering effects but that may not carry with them the requisite negative economic implications.165 This urge or desire to compensate is increased because of the awareness that the remedy provided under the Act is the only one available to the injured worker. Countervailing this pressure to compensate is the underlying theory of compensation law, to award permanent disability benefits only for those injuries that cause a diminution in earning capacity. Compensation is designed only to protect the worker from economic insecurity and is not a form of “damages” in the sense of relieving the victim from all the effects of the injury. Because of this conflict, the remedy to be provided and the solution to be devised lie with the legislature. A policy choice is presented in which the legislature must weigh the relative interests of the employer, the public, the injured worker, and the integrity of the worker’s compensation system.

Among the alternatives available to the California Legislature is adding a specific injury provision covering “loss of or loss of use of sexual organs” to the California permanent disability rating schedule. The addition of this provision would permit a sexual-impairment injury to constitute prima facie evidence of a permanent disability. This change would have very little effect on the compensation system as a whole and would be arguably consistent with certain facets of the present scheme.166 There are two major shortcomings of this alternative. First, only a trivial amount of compensation would most likely be designated for this type of injury.167 Second, there is a danger that work-


165. See note 108 supra.

166. “Arguably” consistent because there would undoubtedly be some question as to the validity of such a presumption. The loss of taste and smell is included in the California schedule, and as Hanna states, “[a]lthough such sensory losses . . . from a practical standpoint, produce no real loss of ability to work or earn, they are assigned a theoretical rating value.” 2 Hanna, supra note 9, § 14.01(2)(c). This represents an example of an injury which is deemed compensable, even though it most likely will not cause a “disability.”

167. This award would not compensate the worker for the full effects of the injury and
ers may attempt to take advantage of such a provision by claiming their sexual dysfunction was caused by the stresses of the work environment.

A second alternative would be to add a catchall provision to the rating schedule, whereby all workers who sustain injuries that impair physical functions would be awarded permanent disability benefits. The purpose of such awards would be to fill a void in the existing law and to insure that workers would receive monetary recoveries for such injuries. These sympathy awards could have no possible relation to the economic consequences associated with the injuries, and would, in effect, represent tort damages. Adopting such a catchall provision would have more far-reaching consequences than the previous proposal because it would entail compensating a wide range of nondisabling injuries besides those causing sexual impairment. This solution would also manifest an express disregard for the earning capacity principle upon which the entire worker's compensation system operates. Erosion of the earning capacity principle would be destructive of the integrity of the worker's compensation system as a whole.

An even more radical solution would be to adopt the "whole man" theory and thereby compensate for "injuries" as opposed to "disabilities." Compensation would be granted not only for "disabling injuries" but for injuries that would impair the employee's ability to engage in activities unrelated to employment. The whole man theory, however, attacks the basic premise of worker's compensation and has been discounted by most legal scholars.

A fourth alternative is to use the "dual theory" to determine the existence and degree of disabilities. However, because nondisabling injuries would be compensable under this doctrine, the same dangers associated with the "whole man" theory are applicable to "dual coverage."

As a fifth alternative in California, the legislature could enact no changes at all and permit the compensation judges to construe the pro-

would constitute, as Larson terms it, a "let's-give-the-poor-guy-something" type award. See note 136 supra.

168. See notes 121-32 & accompanying text supra.
169. See notes 133-37 & accompanying text supra.
170. This view is supported by Whitebook, Permanent Partial Disability Under the Workmen's Compensation Acts, 28 IOWA L. REV. 37, 54 (1942). Another writer sets forth a proposal which adds a little twist to the "whole man theory." He would award benefits for injuries which prevent the person from engaging in the normal pursuits of life and if the injury also affected the worker's employment, the benefits would be increased accordingly. 1959 U. ILL. L.F. 655, 659. Another writer has proposed that 100% indemnity should be afforded for all elements of harm suffered by the worker. Note, A Plea for Modernizing Workmen's Compensation—The Case for the Worker, 1 STAN. L. REV. 126, 133 (1948).
171. See generally 2 LARSON, supra note 13, §§ 57.10, 58.32.
172. See note 60 & accompanying text supra.
visions of California Labor Code section 4660 liberally. Permanent disability benefits could be awarded upon findings of “disfigurement” or “psychiatric disabilities.” Such findings would not likely be bona fide but would be attempts to circumvent the Act and to provide compensation. Such intellectual dishonesty and disregard for the earning capacity principle should not be encouraged because of the disrespect for law that such a practice fosters. In addition, some judges may feel sympathetic towards the claimant’s plight and require little or no evidence of visible scarring or emotional problems, while other judges may be more strict and insist upon a showing that such an injury will cause a diminution in the worker’s earning capacity. Different results accorded workers who sustain identical injuries with identical effects is not a desirable situation.

The most equitable solution is to give the worker with a sexual-impairment injury an additional tort remedy by way of a common-law action for damages. As Larson states,

This would be more equitable from the employer’s point of view, because he would be liable only when actionable negligence attributable to him could be shown, and from the employee’s point of view, because he would not be held down to maximum limits of two or three thousand dollars for injuries which might, at common law, bring verdicts of many times that amount.

Worker’s compensation benefits paid under the Act, such as medical treatment and temporary disability payments, would be deducted from the tort recovery. By this offset, the employer would not be subject to double liability, in the sense of paying twice for the same elements of damage. If the worker were unsuccessful in his negligence action, he nevertheless would be permitted to retain the compensation benefits received. Under this proposal, permanent disability indemnity benefits would not be awarded for nondisabling injuries. Instead, “damages” would be granted upon a showing of employer negligence in a separate tort action. Therefore, the principle of loss of earning capacity need not be displaced, nor would strained construction of that theory be necessary.

This Note advocates an end to the practice of granting small amounts of permanent disability benefits for sexual-impairment injuries under the guise of “psychiatric disabilities.” Such sympathy awards are not consistent with the basic scheme of worker’s compensation and are attempts to circumvent the Act itself. Allowing a separate tort remedy would place sexual-impairment injuries outside of the worker’s compensation framework for the purpose of providing the

173. This solution has been suggested by Larson, 2A LARSON, supra note 13, § 65.30, and by the dissenting justice in Moushon v. National Garages, Inc., 9 Ill. 2d 407, 413-20, 137 N.E.2d 842, 845-49 (1956).
174. 2A LARSON, supra note 13, § 65.30, at 18.
worker\textsuperscript{175} with an opportunity to recover for the permanent effects of the injury. The worker would be required to prove negligence on the part of the employer, a burden which may prove to be quite difficult. However, such a burden rightly rests upon the worker for he would still be entitled to receive compensation benefits, regardless of a failure in the negligence action, and because such a suit constitutes an exception to the worker's compensation system.

This Note does not advocate that an additional tort remedy be made available to workers who receive other normally nondisabling injuries. Sexual-impairment injuries are different in nature and involve interests that have significant impacts on people's lives. The United States Supreme Court has declared the interest in procreation to be a basic and fundamental civil right.\textsuperscript{176} Being able to function sexually appears to be a similar fundamental right, also worthy of great protection. However, such interests are not recognized under the worker's compensation system because of its emphasis on the economic consequences of injuries, as opposed to their psychic and spiritual effects on workers. Besides involving basic rights, sexual-impairment injuries are unique in that they affect a part of the body covered by clothing so as not to be normally visible and thereby disfiguring, and they affect members of the body which perform no function in an employment context and therefore do not generally cause physical limitations for work. There may exist other injuries with similar qualities, but none which involve such basic interests. For the above-stated reasons, this Note suggests that sexual-impairment injuries should be treated apart from others and a tort remedy provided therefore.

There is, however, a procedural hurdle that must be overcome with respect to this alternative. The courts agree that industrial injuries create but one cause of action that cannot be divided into separate elements of damage available from separate tribunals.\textsuperscript{177} The proposal presented here would violate this principle by allowing an employee to recover compensation in an administrative hearing and damages in a court of law. However, the fairness associated with the providing of the additional tort remedy, along with its consistency with the principle of loss of earning capacity, more than offsets the added burden to the employer. Such a procedural hurdle should not stand in the way of the needed remedy.

\textsuperscript{175} This Note does not recommend that loss of consortium suits be made available to spouses of the injured worker. The worker is still under the Act in the sense of being able to receive compensation benefits.

\textsuperscript{176} See Skinner v. Oklahoma, 316 U.S. 535 (1941).

\textsuperscript{177} Williams v. State Compensation Ins. Fund, 50 Cal. App. 3d 116, 122, 123 Cal. Rptr. 812, 815 (1975); Hyett v. Northwestern Hosp., 147 Minn. 413, 417, 180 N.W. 552, 553 (1920); Adams v. Iten Biscuit Co., 63 Okla. 52, 61, 162 P. 938, 946 (1917).
There must be a legal recourse when a worker sustains a sexual-impairment injury. Although bestowing the worker with an additional tort remedy is inconsistent with a major premise of worker's compensation, it is a change warranted by the unfairness of the present worker's compensation scheme.