

1955

# Mental Disturbance in the Law of Torts--A Problem of Legal Lag

William B. Goldfarb

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

## Recommended Citation

William B. Goldfarb, *Mental Disturbance in the Law of Torts--A Problem of Legal Lag*, 6 W. Res. L. Rev. 384 (1955)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol6/iss4/4>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# WESTERN RESERVE LAW REVIEW

Member of the National Conference of Law Reviews

Published for THE FRANKLIN THOMAS BACKUS SCHOOL OF LAW  
by THE PRESS OF WESTERN RESERVE UNIVERSITY, Cleveland 6, Ohio

## EDITORIAL BOARD

RICHARD J. CUSICK, JR., *Editor-in-Chief*

RUSSELL Z. BARON, *Managing Editor*

CHESTER E. GORDON, *Notes Editor*

RICHARD E. GUSTER, *Recent Decisions Editor*

William V. Cawley

Frank H. Harvey, Jr.

Arthur S. Leb

Alfred L. Margolis

Bernard H. Niehaus, Jr.

Phyllis J. Offenbacher

Charles R. Perelman

Thomas S. Schattenfield

Fred Siegel

Harry Stein

James E. Wanner

William L. Ziegler

SAMUEL SONENFIELD, *Faculty Adviser*

WALTER PROBERT, *Assistant Faculty Adviser*

## NOTES

### *Mental Disturbance in the Law of Torts— A Problem of Legal Lag*

#### INTRODUCTION

In an era when the frontiers of psychology are steadily retreating before the inexorable advance of science, in an age when the average man is increasingly concerned with the impact of his emotional problems, in a society whose best-selling books include such titles as *Peace of Mind* and *How to Stop Worrying and Start Living*—in such a time and in such a culture, the courts have not yet extended a full measure of protection to the interest in mental and emotional tranquillity. It is perhaps the most under-protected interest in the law of torts.

If it be true that positive law is the product of the numerous conflicts of interests which characterize every society, then tort law is the product of a specific conflict, that between individual freedom of action on the one hand and individual security on the other. The degree of protection afforded to various interests logically ought to be an index of the value placed upon them by our culture. To the extent that this is the case, law is an accurate reflection of the evolving social organism and a constructive catalyst in its evolution. To the extent that it is not the case, the law is guilty of inertia and anachronism. It is the purpose of this essay to apply this criterion to the law of mental disturbance.

## DOCTRINE AND CRITIQUE

The complex doctrine and rationale which have grown up in this area do not lend themselves to simple restatement. In addition to the inherent complexity of the problem we are in a sphere where the law is in flux. This may be a clue to movement, to development. Or it may be a symptom of confusion. In either event, the law of yesterday is not the law of today. And that of today may no longer be tomorrow.

The dominant note was sounded in the early case of *Lynch v. Knight*.<sup>1</sup> "Mental pain or anxiety the court cannot value, and does not pretend to redress, when the unlawful act causes that alone." Actually, it was not until the early years of this century that actions predicated on such injuries began to be brought in significant numbers. The courts responded with unanimity in their refusal to recognize the injury as legal damage.

From the very beginning two important exceptions have accompanied the doctrine of non-recovery. The first was the granting of recovery for assault. The injury redressed in an action for assault was obviously a mental state—the *fear* of an imminent bodily harm. This exception has been viewed as an historical anomaly.<sup>2</sup> It is possible, with logic more apparent than real, to reconcile this exception with the prevailing negative attitude toward tortiously caused fright. In the action of assault, the law was not protecting the tranquil state of *mind*; it was extending its protection of the integrity of *body*. To discourage the intentional invasion of the latter interest, the courts would punish a defendant who threatened such an invasion though without a consummation. Thus, a plaintiff slightly though reasonably frightened in the face of what seemed an imminent blow was given a cause of action. A plaintiff severely frightened at the prospect of a great, but not imminent, physical danger was remediless. The historical reconciliation does not remove the incongruity.

The second exception was legalistic and technical. For mental disturbance alone, there may be no recovery. But if the plaintiff could establish the elements of some independent traditional tort, however slight, however tenuous, he could recover damages for the mental disturbance. The basis of the cause of action was the battery,<sup>3</sup> the slander or the false imprisonment.<sup>4</sup> The mental disturbance was redressed by "parasitic damages." It will not do for us moderns to mock the inventors of this legalism. It may be artificial, but in many jurisdictions it is still the law; and in negligence cases it is the general rule.<sup>5</sup>

<sup>1</sup> 9 H.L.C. 577, 11 Eng. Rep. 854 (1861).

<sup>2</sup> RESTATEMENT, TORTS § 24, comment *c* (1934).

<sup>3</sup> *William Small and Co. v. Lonergan*, 81 Kan. 48, 105 Pac. 27 (1909).

<sup>4</sup> *Deaderick v. Smith*, 33 Tenn. App. 151, 230 S.W.2d 406 (1950).

<sup>5</sup> *U.S. v. Hambleton*, 185 F.2d 564 (9th Cir. 1950); *Ex parte Hammert*, 259 Ala. 240, 66 S.2d 600 (1953).

The courts have traditionally supported their position with two types of reasoning: They have, in the first place, argued that such injuries were by their nature too "remote" and therefore not proximately caused by the defendant's act.<sup>6</sup> They have, in the second place, maintained that to allow recovery would encourage a flood of litigation, much of it based on trivial or fictitious claims.<sup>7</sup> Both "reasons" seem rather to be justifications for a conclusion than grounds therefor. To call the injuries "remote" is to beg the question. And as for the threatened "flood of litigation" it would be a valid argument only on the assumption that all the claims *would* be fictitious. As long as a portion of the claims are real it is a failure of the judicial process if they must go unsatisfied in order to protect the courts against imposition.

We must look elsewhere for the true explanation. The language and tone of many of the opinions hint at a certain social attitude and a conception of science, harbored by the courts, which can better account for the existing doctrine than can the express grounds of decision. This attitude and this conception are rarely articulated, and, it is submitted, they are both out of tune with our times. The courts seem to believe that society places a low valuation on the interest in mental tranquillity. These courts are not accurately reflecting the attitude of the community. In addition, some courts seem to believe that mental anguish is not real, that mental disturbance is not provable, that the principles of psychological causation are either too esoteric for the jury to grasp or too unreliable for the courts to trust. These courts are not reflecting the progress of scientific knowledge.

The supposed social attitude may be formulated in tort-law terminology thus: one does not have a duty toward one's fellows to avoid the infliction of mental disturbance. Courts do not speak so bluntly, but this is the import of their decisions. Yet the tenor of our age in American society is one of increasing emphasis on the importance of emotional quietude. Having achieved a high level of physical comfort and having made great progress in eliminating many ravaging diseases, and having thereby prolonged physical life, our concern is being increasingly directed toward the amelioration of our psychological climate. We are increasingly cognizant of the mental stresses and strains of our high-speed, intense existence. To the modern man, anxiety, restlessness and insomnia are often afflictions more dread than a backache or a fractured leg. At least they may more fully disable him from enjoying life and the fruits of his labors. An interesting picture of the judicial recognition (in another connection) of this desire for calm and tranquillity is afforded by a recent constitutional

---

<sup>6</sup> *Smith v. Gowdy*, 196 Ky. 281, 244 S.W. 678 (1922).

<sup>7</sup> *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896).

case.<sup>8</sup> Despite the long-favored status of the right of free speech, the Supreme Court held it a valid exercise of the municipal police power for a town to restrict the use of sound trucks on its streets. The court spoke of the "quiet and tranquillity so desirable for city dwellers."

The apparent scientific misconception is more difficult to formulate and to interpret. The courts seem reluctant to recognize the actuality and substantiality of mental distress. The injuries have been characterized as "more sentimental than substantial," "metaphysical,"<sup>9</sup> "vague," "shadowy," "illusory."<sup>10</sup> In thus characterizing mental phenomena the courts seem to be reflecting a pre-modern notion.<sup>11</sup> How account for this retardation?

It is a commonplace in the field of education that the learning process moves from the concrete to the abstract, from the tangible to the intangible, from the seen to the unseen. Perhaps this is true of civilizations as well. At a primitive stage, ideas are conceived of with the aid of visible images. That which cannot be perceived through the senses is feared, and, as a reaction, is either demonized or deified. When a rock strikes a man's leg and the leg is broken, the chain of causation is clear, obvious, simple. But when a man (or a community) has some unexplained illness or trouble, the causal vacuum is filled by superstition and demonology.<sup>12</sup> As a culture matures, it gradually attains an enlightened attitude toward phenomena the reality of which it senses but which it cannot perceive or measure in the same way as the purely physical. This may account for the suspicion and ignorance which have always surrounded the idea of "mind" and mental aberration. A physical deformity is visible, understandable; a mental deviation is obscure, mysterious.

Our generation fancies itself to be sitting at the zenith of enlightenment. But we are too close to the burning of witches to be smugly certain that our attitude toward mind is not tainted with suspicion and fear. We do not whip the insane. But we do subject them to inadequate facilities in overcrowded, understaffed hospitals.<sup>13</sup> And who will maintain that we view schizophrenia with the same objectivity as pneumonia? Do we not sometimes feel that the mind is inscrutable and unknown when compared

<sup>8</sup> *Kovacs v. Cooper*, 336 U.S. 77 (1949).

<sup>9</sup> *Smith v. Gowdy*, 196 Ky. 281, 244 S.W. 678 (1922).

<sup>10</sup> See 52 AM. JUR. 396 (Torts § 51, n. 18 and cases cited therein).

<sup>11</sup> There occasionally appears an opinion in which the court exhibits not only an enlightened conception of the emotions but also a recognition of the importance attached by our society to freedom from mental disturbance. See *Chiuchiolo v. New England Wholesale Tailors*, 84 N.H. 329, 150 Atl. 540 (1930). Sometimes a court seems conscious of the weakness of its position but feels bound by precedent. See *Comstock v. Wilson*, 257 N.Y. 231, 177 N.E. 431 (1931).

<sup>12</sup> FRAZER, *THE GOLDEN BOUGH*, chap. 56 (1952).

<sup>13</sup> *FACTS AND FIGURES ABOUT MENTAL ILLNESS AND OTHER PERSONALITY DISTURBANCES*, (New York: The Nat'l. Ass'n. for Mental Health, 1952), p. 7.

with the organs of the body? This being the case, is it surprising that judges speak of mental injury as "sentimental," "metaphysical," and of "mere fright or shock" saving the appellation "actual" for bodily injury?<sup>14</sup>

Be that as it may, it must be conceded that, in the United States, we have been making notable strides in the development of a more civilized and more enlightened attitude toward the mind and mental phenomena. One of the remarkable features of the Twentieth Century has been the recognition accorded to the psychological and psychiatric sciences and the great advances in these sciences themselves.

The last half century has seen enormous strides in psychiatry and in psychosomatics. Today psychologists and psychiatrists understand much about mental reactions, both normal and abnormal, and about human behavior, which was totally unknown fifty years ago. Much of this knowledge should have a direct bearing on our problem. For example, a common habit of the courts is to speak of mind and body as if they were separate and unrelated entities. Yet, the modern tendency in science is to obliterate the boundary between physical and mental and to conclude that they are interrelated and have mutual effects.<sup>15</sup> What appears to be a mental disturbance may reflect a physical disorder, and what appears to be purely physical may be emotional in origin. The well-established doctrine that "mere words" however humiliating and abusive do not constitute an assault<sup>16</sup> seems predicated upon a belief that words cannot hurt one too badly. But a recent article, in summarizing the findings of psychosomatic experiments at the Cornell University Medical College and the New York Hospital, declares that

... the scientific facts disclosed . . . require us to re-examine the conclusive effect given to physical blows and cavaliness with which we treat the war of words. . . . The . . . experiments have shown beyond possible doubt that "insulting and angry words," irrespective of the intent of the speaker, may permanently injure health and may result in death by causing internal organs of the addressee to destroy themselves in a vain attempt to fight against hostile words.<sup>17</sup>

<sup>14</sup> *Miller v. The Baltimore & Ohio S.W. R.R. Co.*, 78 Ohio St. 309, 85 N.E. 499 (1908).

<sup>15</sup> THORMAN, *TOWARD MENTAL HEALTH*, (New York: Public Affairs Pamphlets No. 120), p. 4.

<sup>16</sup> *Maze v. Employees' Loan Society*, 217 Ala. 44, 114 So. 574 (1927). Plaintiff alleged that defendant's servant called upon plaintiff many times in a gross, common, rude and insulting manner, made persistent, vexatious and embarrassing demands for money not due, wantonly and maliciously attempting to enforce payments, and, as a consequence, plaintiff suffered great mental disturbance and anxiety and was held up to the scorn, contempt and ridicule of his business associates. Held, nonsuit affirmed. And see *Ex parte Hammett*, 259 Ala. 240, 66 So.2d 600 (1953).

<sup>17</sup> Mark, *Psychosomatics and Judicial Separations*, 20 *FORD. L. REV.* 84 (1951). The article deals with "the war of words" in another connection, but many of its conclusions are equally pertinent to our problem.

The same report describes the internal physical effects of emotional stresses and states that these effects can, with proper apparatus, be detected and even photographed.

Half a century ago an English judge ventured to say that he would not be surprised "if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection of the physical organism."<sup>18</sup> Later judges have all too often been unaware or unappreciative of what science has to say. And many of today's opinions represent a less enlightened conception of the nervous system.<sup>19</sup> In view of the status of modern psychology it seems naive to describe mental distress as "metaphysical."

But the courts are not only backward in their apparently weak grasp of established psychological facts; they are backward in their view of the general knowledge of these facts and the wide concern for their implications which characterize our society. Men are increasingly cognizant of their own minds and of the minds of their fellows. Our popular literature bears the imprint of our interest in psychology. Among the educated classes conversation is full of psychiatric jargon. A severe shock is a "traumatic experience"; an unusual pattern of behavior reflects a "complex" or a "neurosis." Our art and entertainment media present dramas whose plots are constructed around psychological conflicts. Our comedians would be lost without "psychological material." Warfare has its psychological aspect; brain-washing is a weapon to be feared. In short our society, at least in a certain stratum once called the intelligentsia, and to a considerable extent among the readers of the daily paper and the viewers of television, is increasingly conscious of mental problems, mental tranquillity and mental disturbance. The postulates of psychosomatics are part of our parlance, but they have not yet percolated through the strata of judicial precedent. The courts are still bedevilled by the vestiges of nineteenth century mechanism and perhaps by shreds of even more outmoded philosophies.

How explain the attitude of the courts? "Cultural lag" is a well-known sociological phenomenon. Science and technology are always ahead of social knowledge; scientists discover truth faster than society learns to use it. It would seem that the law is even further behind, exhibiting what might be called "legal lag." When the community, although it too is backward in terms of the knowledge available to the psychologist, is well aware of the actuality of mind and of mental disturbance, it is, to say the least, conservative of courts to speak of mental disturbance as if it cannot be measured or

---

<sup>18</sup> *Dulieu v. White*, 2 K.B. 669, 677 (1901).

<sup>19</sup> *Belt v. St. Louis-San Francisco Ry. Co.*, 195 F.2d 241 (10th Cir. 1952). The court said, "the courts generally draw a line between the purely physiological and the psychological, the corporeal and the psychical." See also *Cushing Coca-Cola Bottling Co. v. Francis*, 206 Okl. 553, 245 P.2d 84 (1952).

diagnosed. Tennyson said "Science moves, but slowly, slowly creeping on from point to point."<sup>20</sup> What would he say of the law?

But the law has not been entirely static. Recent years have seen notable changes. A growing minority of the courts recognize as an actionable wrong the *intentional* infliction of mental disturbance, in extreme cases.<sup>21</sup> The courts apparently feel that there is here an element of moral fault on the part of the defendant which justifies punishing him. Some also argue that the nature of the defendant's intent serves to attest to the reality of the plaintiff's injury, though this seems to be a patent *non sequitur*. The courts are infinitely more reluctant to allow recovery where the defendant's action is merely negligent, and the general rule denies recovery. This may be one means of relieving against the harsh rule of universal non-recovery without opening the floodgates to the apprehended tidal wave of lawsuits. But it is not necessarily a logical or sound approach. If a slight injury, intentionally inflicted, is compensable, why not a severe injury, negligently inflicted? Admittedly, this suggestion is predicated on a theory of tort law which sees as its central idea the compensation of injured plaintiffs rather than the punishment of blameworthy defendants.

Sometimes the courts seem to feel that no reasonable man would foresee certain emotional consequences of his act. But it is not unfair to state that, given the degree of awareness which exists today of the mental implications of injury, the reasonable man is often, or should be, aware of the results likely to follow. Do courts perhaps feel that a jury is more capable of determining the issues in the case of bodily injuries than in the case of mental distress? If so, they may be mistaken. Personal injury cases often involve complicated questions of medical causation. And where doctors differ, juries are told to decide. Moreover, it is surely no easier to decide whether mental distress caused a bodily harm, yet most courts allow the jury to speculate on this question.<sup>22</sup>

<sup>20</sup> From "Locksley Hall."

<sup>21</sup> Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939). See *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *Curnett v. Wolf*, 244 Iowa 683, 57 N.W.2d 915 (1953).

<sup>22</sup> See *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952). This case typifies the few courts which have gone quite far in the direction of enlightenment. The court said, "The jury is ordinarily in a better position . . . to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury." In another recent California case the trial court instructed the jury that "definite nervous disturbances or disorders caused by mental shock and excitement are classified as physical injuries and will support an action for damages for negligence." But the court refused to answer a juror's inquiry as to whether loss of sleep is a physical injury and instead



Where physical injury is the ultimate result of the defendant's action, intentional or negligent, courts are often willing to allow recovery.<sup>23</sup> Many courts still require a contemporaneous physical impact,<sup>24</sup> though their willingness to be satisfied with the slightest impact reduces the requirement to an absurdity.<sup>25</sup> Some courts recognize that mental distress or shock may, without impact, lead to serious physical injury. They are willing to see a "psychic link in the chain of causation."<sup>26</sup> Most courts refuse recovery if there is no visible physical injury.<sup>27</sup>

Where the defendant occupies a special position which imposes on him a higher duty toward the plaintiff than that borne by the ordinary citizen, most courts allow recovery even for mere insult. Under this view, common carriers, innkeepers, theater owners and the like have been held liable.<sup>28</sup>

---

stated that "if as a proximate result of physical consequences or physical injuries the plaintiff suffered loss of sleep, you may consider that in . . . awarding damages." The appellate court affirmed and declared that this instruction "clearly stated the law with reference to loss of sleep." *Espinosa v. Beverly Hospital*, 114 Cal. App. 2d 232, 249 P.2d 843 (1952).

<sup>23</sup> As early as 1890 many courts allowed recovery where a pregnant plaintiff suffered a miscarriage as a result of fright and shock. *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890). *But see Jones v. Western Union Telegraph Co.*, 233 Fed. 301 (S.D. Cal. 1916). The court said, ". . . sickness which is merely a sequel of mental suffering or anguish cannot be differentiated from the mental suffering or anguish itself. . . . If the sickness be but an aggravated form of mental suffering, it would still be but mental suffering and therefore not a basis for damages. . . ."

<sup>24</sup> *But see Schuh v. Prudential Insurance Co. of America*, 96 F. Supp. 400 (D. Minn. 1950); *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951). The Maryland rule is that where the wrongful act . . . is the proximate cause of the injury and the injury ought to have been contemplated in the light of all the circumstances as a natural and probable consequence thereof, the case should be left to the jury. Under this rule plaintiff, a five year-old girl, could recover against her father's estate for the mental anguish she suffered when her father blew her mother's head off with a shotgun, kept plaintiff with the body for a week and then committed suicide in her presence. See also *Amos v. Prom, Inc.*, 115 F. Supp. 127 (N.D. Iowa 1953). This case allowed a substantial recovery for the emotional distress suffered by a Negro girl who, in violation of the Iowa Civil Rights Statute, was refused admission to defendant's ballroom. The court declared that the "relatively new concept" of "legal protection for emotional tranquility or 'peace of mind'" renders "questionable many earlier decisions both as to legal principles and to the value placed upon this protected interest." This approach is all too rare.

<sup>25</sup> *Comstock v. Wilson*, 257 N.Y. 231, 177 N.E. 431 (1931); *Richardson v. Wilkes Barre Transit Corp.*, 172 Pa. Super. 636, 95 A.2d 365 (1953).

<sup>26</sup> *Magruder, Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936). A dictum in *Cote v. Litawa*, 96 N.H. 174, 71 A.2d 792 (1950) would allow recovery "for physical consequences of fright and shock, provided negligence and causation are established."

<sup>27</sup> *Belt v. St. Louis-San Francisco Ry. Co.*, 195 F.2d 241 (10th Cir. 1952).

<sup>28</sup> *Emmke v. De Silva*, 293 Fed. 17 (8th Cir. 1923); *Saenger Theatres Corp. v. Herndon*, 180 Miss. 791, 178 So. 86 (1938); *Geers v. St. Louis Public Service Co.* 247 S.W.2d 318 (Mo. App. 1952); RESTATEMENT, TORTS § 48.

Many jurisdictions impose liability upon telegraph companies where the negligent transmission of a message causes mental disturbance. Others deny it even in some extreme cases. An unusual exception is sometimes recognized in the case of a defendant who mishandles a dead body. Apparently, the sensibilities of some courts are so aroused, that they would allow recovery for mental disturbance alone, though they seem relieved to find a technical tort.<sup>29</sup>

Although there has been considerable progress in this area, the law is still retarded. The current doctrine is most sharply exemplified in four typical results:

1) There is no recovery for mental disturbance alone if negligently caused, but there is recovery if it is wilfully or intentionally caused.

2) While there is no recovery for mental disturbance alone, there will be recovery if the mental disturbance resulted in some bodily injury.<sup>30</sup>

3) While there is no recovery for mental disturbance as such, if another ground for recovery, however slight, is once established, the mental disturbance may be compensated.<sup>31</sup>

4) Even negligently-caused and slight mental disturbance may be actionable if the defendant occupied a special position.

Even jurisdictions which allow recovery for the results of fright and shock without accompanying physical impact may retreat when the fright is occasioned by a threat to the physical safety, not of the plaintiff but of another.<sup>32</sup> These cases would seem to manifest a desire to limit liability to a narrowly-defined zone of risk. But they also contain echoes of the ancient requirement of a technical assault.

The entire doctrine lacks unity of viewpoint. It is riddled with excep-

---

<sup>29</sup> Lanford v. West Oakwood Cemetery Addition Inc. 223 S.C. 350, 75 S.E.2d 865 (1953); Sanford v. Ware, 191 Va. 43, 60 S.E.2d 10 (1950).

<sup>30</sup> An unusually liberal position is taken in *Rebouche v. Shreveport Railways Co.*, 53 So. 2d 510 (La. App. 1951). The court, in allowing recovery if defendant was negligent, found as a fact that though no physical injury was established and that the collision was not violent enough to have resulted in any danger to the average woman in plaintiff's pregnant condition, she worried a great deal about herself and the possible effect that the occurrence had upon her, and this worry resulted in genuine mental suffering.

<sup>31</sup> *Kuhr Bros. Inc. v. Spahos*, 89 Ga. App. 885, 81 S.E.2d 491 (1954). Some courts do not even recognize mental anguish *disconnected from physical suffering* as an element of actual damages in a personal injury action in which the requirement of "impact" was satisfied. *Savery v. Gray*, 51 So. 2d 922 (Miss. 1951). A recent case held that under a statute permitting the parents of a minor child to maintain an action for injury to him and providing that such damages may be given as under all the circumstances may be just, grief and anguish are not elements entering into the determination of damages. *Hayward v. Yost*, 72 Idaho 415, 242 P.2d 971 (1952).

<sup>32</sup> *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); *Cote v. Litawa*, 96 N.H. 174 71 A.2d 792 (1950); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935).

tions and inconsistencies. If the mental disturbance which results from a technical tort or is intentionally inflicted is not too remote, or sentimental or too difficult for a jury to measure, why does this barrier loom so large in other cases? Does "impact" really make the mental distress more real or provable? Does the defendant's character make the harm less illusory and eliminate the risks of imposition? We must conclude that the common denominator implicit in this doctrine is a reluctance to recognize the high value which society places on freedom from mental distress coupled with an absolute view of the science of psychology.

#### THE OHIO VIEW

When we turn to the Ohio cases we find that this state is, in this connection, among the most resistant to progress. Two cases amply illustrate the point. They are *Miller v. B.&O. S.W. R.R. Co.*<sup>33</sup> and *Bartow v. Smith*.<sup>34</sup> In the *Miller* case a woman brought an action against a railroad and claimed that as a result of the defendant's negligence, a locomotive and several cars ran into her house, shattering two walls and an interior partition. The plaintiff was, at the time, standing on her premises a few feet from the point of impact. She alleged that "by reason of the gross carelessness and negligence of the defendant . . . she suffered a severe nervous shock that shattered her nervous system and cause her great bodily pain and mental anguish and permanent injury to her person and health." The trial court sustained the defendant's demurrer. In affirming the judgment the Ohio Supreme Court declared that

There was no claim . . . that plaintiff received any actual *bodily* injury, or that the negligence of the defendant was wilful and wanton. . . . The question [is] whether or not in an action for negligence, unaccompanied by any element of wantonness or intentional wrong, there can be a recovery of damages for alleged physical injury caused by *mere* fright or shock.<sup>35</sup> (emphasis supplied)

The question being presented in Ohio for the first time, the court sought authority in other jurisdictions and selected a Pennsylvania case the syllabus of which stated that "mere fright, occasioned by such an accident, producing permanent injury to the nervous system, is a result too remote to be actionable."<sup>36</sup> The Pennsylvania case required that the mental distress to be compensable be accompanied by some physical injury. The court in *Miller* also leaned on the leading case of *Mitchell v. Rochester Ry. Co.*,<sup>37</sup> a case which first asserted that there can be no recovery for fright and then, by a

<sup>33</sup> 78 Ohio St. 309, 316, 85 N.E. 499, 501 (1908).

<sup>34</sup> 149 Ohio St. 301, 78 N.E.2d 735 (1948).

<sup>35</sup> 78 Ohio St. 309, 316, 85 N.E. 499, 501 (1908).

<sup>36</sup> *Ewing v. P.C.C. & St. L. Ry. Co.*, 147 Pa. 40, 23 Atl. 340 (1892).

<sup>37</sup> 151 N.Y. 107, 45 N.E. 354 (1896).

bit of specious legalistic reasoning, concluded that if "fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom." As if to show that it was fully aware of the far-reaching implication of this conclusion, the court then added,

That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not there can be no recovery, no matter how grave or serious the consequences.<sup>38</sup>

On such authority was *Miller* decided.

It would be disproportionate and inapposite to discuss the *Miller* case at such length were it not for the fact that its authority was recently revitalized by *Bartow v. Smith*.<sup>39</sup> Plaintiff, a woman, claimed that the defendant, knowing she was advanced in pregnancy, choosing the time and place to wreak the maximum opprobrium on her, hurled vile epithets at her in public. Plaintiff alleged that she was greatly shocked and humiliated, her nerves deranged, her health impaired, and her rest disturbed. In his opening statement counsel for the plaintiff declared that "the evidence will show that for several weeks after that, she could not quit sobbing, she would sob day and night and would waken in the night sobbing." It is immaterial whether she could have proved these allegations. She was not given the opportunity, for the court directed a verdict for the defendant on the basis of the allegations and the opening statement! The court cited the *Miller* case, apparently oblivious of or indifferent to the progress of psychology and of social thinking in the intervening forty years. Because plaintiff did not allege that she was put in fear or terror or that defendant was guilty of an assault, the actions of the defendant were held to amount to *damnum absque injuria*. And for reasons to support this regressive view the court adopted the language of two old Kentucky cases<sup>40</sup> to the effect that the damages are "too remote and speculative" and "the injury is more sentimental than substantial!"

The only consoling note in the current Ohio position is that the *Bartow* decision was made by a bare majority and with two strong dissents. The dissenters fight the decision on two fronts:

1) The modern tendency is to recognize such injuries. This is not an action to recover for fright or shock but for the physical injury caused by or through the fright or shock.

<sup>38</sup> *Id.* at 109, 45 N.E. at 354.

<sup>39</sup> 149 Ohio St. 301, 78 N.E.2d 735 (1948).

<sup>40</sup> *Reed v. Ford*, 129 Ky. 471, 112 S.W. 600 (1908). The language of this case was quoted with approval in *Smith v. Gowdy*, 196 Ky. 281, 285, 244 S.W. 678 (1922).

2) The *Miller* case was based on negligence and, by implication, would have yielded a different result in the case of an intentional tort, and the *Bartow* case involved such an intentional tort.

But even the dissenters would stop short of allowing recovery "for fright or shock alone, in the absence of consequential physical harm or damage." And they are not in the least disposed to impair the authority of the *Miller* case in cases where the actor's conduct is merely negligent.

#### THE RESTATEMENT VIEW

No discussion of this field would be complete without reference to the *Restatement of Torts*, for it provides an illuminating projection of the tendency of the law. The *1934 Restatement* states that there is no liability even for intentionally produced emotional disturbance or "bodily harm unexpectedly resulting from such disturbance."<sup>41</sup> If emotional distress is "the only legal consequence" of tortious conduct, there is no recovery. But if the defendant becomes liable for a traditional tort, emotional distress is a proper element of damages.<sup>42</sup>

In commenting on this doctrine the authors assert that the interest in mental tranquillity is not, as a thing in itself, of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause emotional disturbance.<sup>43</sup> The law, they declare, regards other interests "as of greater importance" than "the interest in mental and emotional tranquillity."<sup>44</sup>

The *1948 Supplement* introduces drastic changes and announces that "There is a definite trend today in the United States to give an increasing amount of protection to this interest." It allows recovery for "intentionally inflicted severe emotional distress" and admits that the injury suffered in this form may be more serious to the injured party than the tortious invasion of "the interest in bodily integrity."<sup>45</sup> But an eminent authority recently stated that "So far as the amendment to § 46 of the Restatement . . . indicates that there may be liability for infliction of emotional distress alone, without physical consequences, it has little support on the decisions."<sup>46</sup> Even in 1948, however, the *Restatement* indicates that in the case of negligently inflicted mental disturbance there is no compensable injury, although the defendant is liable if anticipable *bodily* illness results.<sup>47</sup>

<sup>41</sup> RESTATEMENT, TORTS § 46.

<sup>42</sup> RESTATEMENT, TORTS § 47.

<sup>43</sup> RESTATEMENT, TORTS § 46, comment *c*.

<sup>44</sup> RESTATEMENT, TORTS § 47, comment *b*.

<sup>45</sup> RESTATEMENT, TORTS §§ 46 and 47 (1948 Supplement).

<sup>46</sup> SMITH AND PROSSER, CASES AND MATERIALS ON TORTS 50 (1952).

<sup>47</sup> §§ 312 and 313 remained unchanged.

In the case of "recklessly caused severe emotional distress" the authors are unwilling to go further than to inject a *caveat*. They also express (perhaps inconsistently with the unchanged rules on negligence set out in §§ 312-313) a *caveat* as to whether one would, in certain circumstances, be liable for negligently caused severe emotional distress.

#### SUMMARY AND CONCLUSION

Society values the interest in emotional health more and more highly. Science has given us the tools for understanding the problems of causation and prognosis which are involved in litigation. The law has made much progress toward recognizing the mind. In its slow and halting advance, it is perhaps inevitable that inconsistencies should have crept in. The courts have "retreated" slowly, at one point and then another. If only the courts did not have so strong an attachment to precedent, and would view their "retreats" as "advances," the progress of the law would be less sluggish.

Too many courts still deny recovery for mental disturbance even where wilfully inflicted. Even more provoking is the fact that one will be compensated for a negligently produced muscle-sprain but, in many, many cases, one will not be compensated for severe mental distress. Such doctrine is justified neither by "logic" nor by "experience." This critique, however, is not intended to advocate that the law should attempt to be à la mode or adopt every fad. To do so would introduce a much-to-be-avoided instability and uncertainty into the judicial process. But it *is* intended to suggest that the courts should adapt themselves with greater flexibility to the changing mores of the people and the changing state of scientific knowledge. After all, both of these change relatively slowly, and it would only require a little oil in the rusty joints of *stare decisis* to achieve a desirable degree of accommodation.

It is time for the courts to re-examine the problem in its entirety, shorn of legalisms, and, in the light of modern science and social thinking, to formulate an enlightened body of doctrine. Surely not every piddling and ephemeral unpleasant sensation should be considered legal injury. That would extend liability too far. But serious and real distresses, tortiously inflicted — whether by intent or negligence — should be compensated.<sup>48</sup> All the artificialities of technical torts and the antiquated notions of "physical" injury should be discarded. The courts, and the lawyers, should learn more of the science involved. Perhaps, they would learn not to characterize every

---

<sup>48</sup> The *Restatement's* delineation of "severe emotional disturbance" is a step in the right direction. But why limit it to intentional torts? As for the danger of fictitious claims, the courts could require a high degree of proof. They could exercise control by withholding the case from the jury where the evidence is clearly inadequate and by their power to reduce excessive verdicts. See *De Loach v. Lanier*, 125 F. Supp. 12 (N.D. Fla. 1954); *Curnett v. Wolf*, 244 Iowa 683, 57 N.W.2d 915 (1953).