Volume 7 | Issue 2 Article 3

1961

Negligently Inflicted Psychic Injuries: A Return to Reason

Alvan Brody

[VOL. 7: p. 232

NEGLIGENTLY INFLICTED PSYCHIC INJURIES: A RETURN TO REASON.

ALVAN BRODY†

THE LAW WITH RESPECT to negligently inflicted emotional distress has long been a favorite whipping boy for legal critics and judicial commentators. The law on this subject, it is said, is irrational, full of paradoxes, replete with tests ill-adapted to the purposes they were explicitly designed to serve, and the relic of a period when medical knowledge about psychic injuries was not so reliable as it is today.

The tag "emotional distress" includes within it such diverse phenomena as fright and its physical consequences, anxiety, humiliation, embarrassment, empathy, and many more. The characteristic situations dealt with under the common rubric are likewise diverse: fear for one's own safety, fear for the safety of another, distress at the mutiliation of the corpse, illness caused by the realization of having injested obnoxious matter in food. To treat all such situations as falling within a unitary classification serves only to confuse and mislead. Over the course of time, courts have adopted many tests, the attempted uniform application of which to all these diverse areas has worked badly. A number of states, for example, adhere to the "physical injury test", a test developed originally in cases where the victim was in danger of an impending accident, or was in an actual accident but without any physical injury. The application of this, and other mechanical tests, in all psychic injury cases has proven to be a strained endeavor.

Originally the tests were designed to prevent two untoward results. It was felt that to permit recovery for mere emotional distress, without more, would open a wide door to fictitious claims. Presumably psychic injuries were easy to feign and difficult to disprove. Secondly, it was felt that to hold a defendant for the consequences of his negligence where those consequences might include injuries greatly out of proportion to the wrong would be unjust and that therefore some "practical" limitation upon liability ought to be established. Of course, the logic of these mechanical tests is open to criticism, and they have been criticized many times. It is said that it is unjust to

† Visiting Assistant Professor of Law, Louisiana State University Law School. B.A. 1953, LL.B. 1957, LL.M. 1958, Harvard University.

deny a just claim for fear of unjust ones; that if a fraudulent claim is what is feared, it is illogical to deny recovery where physical injury has resulted from the emotional distress, for the physical injury is itself a guarantee of a trustworthiness of the claim; that a prejurer can as well lie about an impact as emotional distress; that the existence of a physical injury or an impact does not itself guarantee that the subjective symptoms will not be feigned; that contemporary medical science is equipped to deal with the problems of proof respecting emotional distress and its consequences; that in any event problems of belief and disbelief are, at least in the first instance, for the jury and not the court; that although in some cases psychic injuries may be all out of proportion to the wrong, there are, of course, many instances where such injury is foreseeable and preventable, and, in any event, as between the innocent victim and the negligent wrongdoer it is the latter who should bear the whole loss rather than the former.

The tests which courts have adopted reflect not only their views on such questions of policy, but also certain assumptions about what ought be a proper division of responsibility between judge and jury in the entire area of negligently-inflicted emotional wrongs. Where standards of foreseeability or natural and proximate causation are applied, it is, of course, the jury which applies these standards in the first instance and the courts which review their application. But where mechanical tests obtain, the allocation of responsibility is shifted to a considerable extent in favor of the courts. It is my purpose here to examine the tests and the situations to which they have been applied, or misapplied, with a view toward determining what, in a given species of distress, a proper division of responsibility between courts and juries ought to be.

I.

THE TESTS — PHYSICAL INJURY.

A number of American jurisdictions hold that there can be no recovery for emotional distress unless the wrong produces "physical injury."[1] The reason given, where a reason has been given, is that

1. Chicago, R.I. & P. Ry. v. Caple, 207 Ark. 52, 179 S.W.2d 151 (1944); Perry v. Capital Traction Co., 59 App. D.C. 42, 32 F.2d 938, 940 (1929); Williamson v. Central of Georgia Ry., 127 Ga. 125, 56 S.E. 119 (1906); Boston v. Chesapeake & O. Ry., 223 Ind. 425, 61 N.E.2d 326 (1945); Kalen v. Terre Haute & Indianapolis R.R. Co., 18 Ind. App. 202, 47 N.E. 694 (1897); Zabron v. Cunard S.S. Co., 151 Iowa 345, 131 N.W. 18, 20-21 (1911); Morgan v. Hightower's Adm'r, 291 Ky. 58, 163 S.W.2d 21 (1942); Herrick v. Evening Express Pub. Co., 120 Me. 138, 113 Atl. 16 (1921); Colby v. Inhabitants of Pittsfield, 113 Me. 507, 509, 95 Atl. 1, 2 (1915); Savery v. Gray, 51 So.2d 922 (Miss. 1951); Brisboise v. Kansas City Pub. Serv. Co., 303 S.W.2d 619 (Mo. 1957); Davis v. Cleveland Ry., 135 Ohio St. 401,

since distress of mind is easily simulated, speculative, and difficult to disprove, the requirement of a physical injury is a guaranty of the trustworthiness of the claim.[2] Some courts have held that the requirement of a physical injury is met if the emotional distress results in physical illness, even though the negligence which occasions the distress does not produce any immediate physical injury to the victim.[3] Others apparently do not regard physical injury produced by the distress as a sufficient guaranty of the integrity of the claim, and deny all such claims where there is no "immediate" bodily injury.[4] The requirement of a physical injury has been satisfied by relatively minor impingements upon the person of the plaintiff[5] and it has even been held in one case

---

21 N.E.2d 169 (1939); St. Louis & S.F. Ry. v. Keiffer, 48 Okla. 434, 150 P. 1026 (1915); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958); Norris v. Southern Ry., Carolina Division, 84 S.C. 15, 65 S.E. 956 (1909); Colsher v. Tenn. Elec. Power Co., 19 Tenn. App. 166, 84 S.W.2d 117 (1935); Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917); Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932); Chesapeake & Ohio Ry. v. Tinsley, 116 Va. 600, 82 S.E. 732 (1914); Nichols v. Cent. Vt. Ry., 94 Vt. 14, 109 Atl. 905 (1919); Venske v. Johnson-Lieber Co., 47 Wash. 2d 511, 288 P.2d 249 (1955).

2. See Hendren v. Arkansas City, 122 Kan. 361, 252 Pac. 218, 219 (1927); Morgan v. Hightower's Adm'r, 291 Ky. 58, 163 S.W.2d 21, 22 (1942); Mitchell v. Rochester Railway Co., 151 N.Y. 107, 45 N.E. 354 (1896); [overruled, Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961)]; Brownlee v. Pratt, 77 Ohio App. 533, 68 N.E.2d 798, 801 (1946); Huston v. Borough of Freemansburg, 212 Pa. 548, 61 Atl. 1022, 1023 (1905).

3. Central Georgia Ry. v. Kimber, 212 Ala. 102, 101 So. 827 (1924); Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Usry v. Small, 103 Ga. App. 144, 118 S.E.2d 719 (1961) (death from heart attack induced by fright); Clemm v. Atchison, T. & S.F. Ry., 126 Kan. 181, 268 Pac. 103 (1928) (physical injury sustained when Plaintiff fainted from distress and fell); Sparks v. Tenn. Mineral Prods. Corp., 212 N.C. 211, 193 S.E. 31 (1937); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); Bedard v. Notre Dame Hospital, 151 A.2d 690, 692 (R.I. 1959); Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958); Sternhagen v. Kozel, 40 S.D. 396, 167 N.W. 398 (1918); Sutton Motor Co. v. Crysel, 289 S.W.2d 631, 634 (Tex. Civil App. 1956). Compare Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931).

4. Barnett v. Sun Oil Co., 172 N.E.2d 734 (Ohio App. 1961); Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948); Miller v. Baltimore & O. S.W. R.R. 78 Ohio St. 309, 85 N.E. 499 (1908); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

5. Bedenk v. St. Louis Pub. Serv. Co., 285 S.W.2d 609 (Mo. 1955) (Bruise, $8,000 verdict for physical and emotional distress; plaintiff's child killed in accident); Greenberg v. Stanley, 51 N.J. Super. 90, 143 A.2d 588 (1958) 30 N.J. 485, 153 A.2d 833 (1959) (recovery permitted for entire "psychiatric complex" of emotional shock induced by accident in which plaintiff was hit and her child killed); Kennell v. Gershonovitz, 84 N.J.L. 577, 87 Atl. 130 (1913) (shower of glass, bruise, sprained arm); Porter v. Delaware, L. & W.R. Co., 73 N.J.L. 405, 63 Atl. 860 (1906) (plaintiff hit on neck by something; dust in eyes); Sawyer v. Dougherty, 286 App. Div. 1061, 144 N.Y.S.2d 746 (1955) (air blast, glass and wooden splinters); Mundy v. Levy Bros. Realty Co., 184 App. Div. 467, 170 N.Y. Supp. 994 (1918); (vibration causing fall); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke); Clark Restaurant Co. v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931) ("any injury, no matter how slight"); Potere v. City of Philadelphia, 380 Pa. 581, 112 A.2d 100 (1955) (leap from peril caused hernia; emotional distress far more serious); Hess v. Philadelphia Transp. Co., 358 Pa. 144, 56 A.2d 89 (1948) (electric shock); Hess v. American Pipe Mfg. Co., 221 Pa. 67, 70 Atl. 294 (1908).

to have been satisfied by an offensive touching not amounting to a battery, the touching being said to be a "constructive physical injury."[6] On the other hand recovery has been denied although the victim has been literally frightened to death.[7]

The decisions are replete with paradoxes and inconsistencies. In some states the most trivial physical injury may serve as the foundation to base a claim for extraordinary consequences, and conversely the most serious physical or emotional consequences may go uncompensated because the negligence which occasioned the fright did not also produce an immediate physical injury. But an even more serious charge against the test is that it has been applied to situations where it has no logical relevance, where the wrong is such that physical injury is not its logical or natural consequence. The requirement has been applied, for example, to prevent recovery in cases where the plaintiff's distress is occasioned by fear for the peril of a third person, the plaintiff himself not being in any physical danger from that peril. In one such case an Indiana court denied recovery for the fright and shock sustained by a mother watching her daughter dragged along defendant's railroad platform by a train on the ground that the mother herself sustained no physical injury because of the incident.[8] A New York court has similarly used the physical injury requirement to prevent recovery by a parent for the mental anguish and fear incurred by witnessing injury to her child.[9] Recovery for shock sustained by a wife witnessing an intentional beating of her husband[10] and by a brother upon seeing the body of his sister, beaten to death by defendant,[11] was denied on the ground that the violence was not directed at the plaintiff who sustained no physical injury from the wrong.

Conversely the requirement of physical injury has been utilized to deny recovery for fright at one's own peril from an impending physical injury which subsequently occurs. For example, where defendant's train struck and killed a child whose foot was caught in a cattle guard, the court refused to allow fear incurred by the child prior to impact

6. Arkansas Motor Coaches, Ltd., v. Whitlock, 199 Ark. 820, 136 S.W.2d 184 (1940) (recovery allowed for mental distress occasioned by plaintiff's being ejected from defendant's bus. Conductor's act in leading her off bus by arm held, over three dissents, "constructive physical injury" sufficient to satisfy physical injury requirement).

7. Lee v. City of Burlington, 113 Iowa 356, 85 N.W. 618 (1901) (horse frightened to death — no recovery because no immediate physical injury); Barnett v. Sun Oil Co., 172 N.E.2d 734 (Ohio App. 1961).

8. Cleveland, C.C. & St. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900).

9. Blessington v. Autry, 105 N.Y.S.2d 953 (Sup. Ct. 1951). *But see* Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).

10. Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N.E. 860 (1933).

11. Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936).

as an element of the damage on the ground that the fear did not flow from any physical injury.[12]

The requirement has also been applied in situations where the wrong involved no physical violence at all. It has been applied, for example, in cases where the emotional distress was the result of misinformation supplied by the defendant,[13] in cases of verbal threats[14] or false statements,[15] in actions involving breaches of contractual duties,[16] and in cases involving the mutiliation of a corpse.[17] It is not suggested that there necessarily ought to be recovery in such cases; but it is clear that recovery ought not to be denied because there is no physical injury to the plaintiff, because in such situations, physical injury is not normally involved, as no violence is directed toward the plaintiff.

Aside from the paradoxes it produces and the misapplications it has been given, the test is open to still a third criticism, one related to the function which some appellate courts have assumed in the area of emotional distress. It is, in essence, that the courts themselves are deciding issues of policy in the guise of deciding questions of fact, when perhaps not only the questions of fact but the policy issues themselves are better left to the jury. Since its inception, the physical injury requirement has been thought to be a guarantee against a flood of fictitious claims based upon injuries which are speculative in character and often wholly disproportionate to the wrong.[18] Of course the same dangers may exist where there is a physical injury, especially if it is a trivial one, for the fraudulent plaintiff can as well lie about a physical injury as about an emotional reaction. This is especially true where

---

12. Chicago, R.I. & P. Ry. v. Caple, 207 Ark. 52, 179 S.W.2d 151 (1944). Compare Mack v. South-Bound Ry., 52 S.C. 323, 29 S.E. 905 (1898).

13. Herrick v. Evening Express Pub. Co., 120 Me. 138, 113 Atl. 16 (1921) (erroneous report that plaintiff's son was killed). Kaufman v. Israel Zion Hosp., 183 Misc. 714, 51 N.Y.S.2d 412 (Sup. Ct. 1944) (parents misinformed as to sex of newborn child).

14. Edmond v. American-Hawaiian S.S. Co., 187 Misc. 723, 65 N.Y.S.2d 433 (Sup. Ct. 1946) (threats of bodily harm).

15. Bradick v. Deetjen, 118 N.Y.S.2d 256 (Sup. Ct. 1952) (false and malicious, though nondefamatory statements); Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948).

16. Mississippi Power Co. v. Byrd, 160 Miss. 71, 133 So. 193 (1931) (electricity shut off for two days); Mobile & O.R. Co. v. Flannagan, 141 Miss. 7, 105 So. 749 (1925) (baggage delay); Gulf & S.I.R. Co. v. Beard, 129 Miss. 827, 93 So. 357 (1922) (misdirection); Seidenbach's, Inc. v. Williams, 361 P.2d 185 (Okla. 1961) (Non-delivery of wedding gown and veil).

17. Nichols v. Central Vermont Ry., 94 Vt. 14, 109 Atl. 905 (1919).

18. See Kalen v. Terra Haute & I. R.R. Co., 18 Ind. App. 202, 694, 47 N.E. 694 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). See also Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897).

the physical injury is a "constructive" one,[19] or is unseen.[20] In the course of time, cases did occur where the court was convinced of the genuineness of the claim, convinced that injury of the kind suffered was foreseeable, and the damage not at all disproportionate to the wrong. In such cases the courts, sometimes at the expense of logic and consistency, stretched the notion of physical injury, sometimes even disregarded it (as in the case of willful torts[21] or negligent mutiliation of the corpse of a relative[22]) so as to do justice in the individual case. Thus where plaintiff was confined to a smoke-filled room for fifteen or twenty minutes because of defendant's negligence in failing to provide a fire escape, the Supreme Court of Ohio held the inhalation of smoke a sufficient physical injury to meet the test.[23] Thus where the Pennsylvania Supreme Court was convinced of the justice of a claim for fright and emotional distress caused by an incident in which a truck driver had to leap from his truck to safety, a relatively minor injury sustained in the leap was the basis for recovery for his emotional distress and its results.[24] Thus the Missouri court upheld an $8,000 verdict in favor of a mother who suffered grievous emotional results at watching her child killed as she and the child were attempting to alight from a bus, and grounded the recovery on a minor bruise plaintiff herself sustained in the accident.[25] Some courts, however, have applied the test restrictively (perhaps as a reaction of the vagaries of the requirement), to deny obviously genuine claims. The same Pennsylvania court which allowed recovery for the distress of the truck driver compelled to leap for his life, denied recovery for a heart attack occasioned by fear sustained in the attempt to escape from a charging bull negligently allowed to trespass on plaintiff's land, on the ground that the negligence had caused no immediate, direct physical injury.[26] Although obviously genuine, the court must have felt that the result was disproportionate to the wrong. But how much more sensible it would have been to base the decision on the ground that the consequences were not the foreseeable, or natural and proximate

19. *E.g.*, Arkansas Motor Coaches, Ltd. v. Whitlock, 199 Ark. 820, 136 S.W.2d 184 (1940).
20. *E.g.*, Howarth v. Adams Express Co., 269 Pa. 280, 112 Atl. 536 (1921) (physical injury, here back injury, need not be externally visible).
21. *E.g.*, Blakeley v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945) (willful act, suicide in plaintiff's house; "physical injury" not required).
22. Larson v. Chase, 47 Minn. 307, 50 N.W. 238 (1891); Awtrey v. Norfolk & W. Ry. 121 Va. 284, 93 S.E. 570 (1917). *Cf* Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925) (willful detention of corpse).
23. Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).
24. Potere v. City of Philadelphia, 380 Pa. 581, 112 A.2d 100 (1955).
25. Bedenk v. St. Louis Pub. Serv. Co., 285 S.W.2d 609 (Mo. 1955).
26. Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

results of the negligence, rather than on the ground that there was no physical injury.

Inconsistently applied, the physical injury test has traditionally been the device of appellate courts for deciding issues of fact. Consistently applied, it is their tool for deciding questions of policy and limiting questions of fact. An argument can be made that they have done neither well.

II.

ZONE OF DANGER.

Two states, Connecticut and Maryland, reject the "physical injury" test and allow recovery for emotional distress which is proximately caused by, and a reasonably foreseeable result of the defendant's negligence if the plaintiff is "within the range of ordinary physical danger" (as the Connecticut court phrases the test), or "in peril of physical harm" (as the Maryland court phrases it). The result is to allow recovery where the plaintiff's emotional distress results from fear for his own safety, and to disallow recovery for the plaintiff's fear for the safety of a third person if the plaintiff himself is in a place of safety. In the leading Connecticut case of *Orlo v. Connecticut Co.*,[27] plaintiff was allowed to recover for fright and shock induced by the flashing and hissing of electrical trolley wires negligently caused to break and come in contact with his automobile. Although no direct physical injury resulted — indeed there was scientific evidence that no shock could have resulted — plaintiff was in a zone of danger (or perhaps more accurately what he reasonably believed to be a danger zone), and was entitled to recover for such emotional injuries as would be elements of damage had a direct bodily injury been sustained. In an analogous Maryland case,[28] the court permitted plaintiff to recover for nervous shock sustained during the commission of a murder and suicide in plaintiff's presence, on the ground that plaintiff was inferably in peril of physical harm from the murderer.

Subsequently both courts faced the problem of whether a plaintiff could recover for witnessing harm to third persons and both courts held he could not. In *Resavage v. Davies*,[29] the Maryland court denied recovery to a mother for shock sustained as a result of seeing defendant's automobile strike and kill her daughter, on the ground that the defendant's duty did not extend to a bystander in a place of safety.

27. 128 Conn. 231, 21 A.2d 402 (1941).
28. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).
29. 199 Md. 479, 86 A.2d 879 (1952).

The Connecticut case, *Strazza v. McKittrick*,[30] was more difficult because part of the plaintiff's emotional distress arose from fear for her own safety while within the "zone of danger" and part from fear which arose some time after the accident that her child might have been injured in the accident. The court confined recovery to such distress as was the result of fear of injury to herself, holding that such distress as resulted from the fear of injury to her child was not compensable since it was "too remote in the chain of causation."

The "zone of danger" test as applied to emotional shock suffered by a plaintiff who is personally endangered by defendant's negligence is an appropriate precondition to the application of the usual foreseeability and causation tests. In such personal danger cases, it is foreseeable that one in the zone of danger, or reasonably believing himself to be in the zone of danger, would suffer emotional distress from fear for his own safety, so that, at least in the case of impending personal danger, the formula can be considered as a rejection of the "physical injury" test rather than as interposing any new mechanical test.

With respect to cases involving shock at witnessing harm or danger to third persons, however, the "zone of danger" test has no relevance, as to the Connecticut court recognized in denying recovery for nervous shock from brooding over possible harm to another despite the fact that plaintiff had been within the zone of danger.[31] The Maryland court, on the other hand, in holding that a bystander cannot recover for shock sustained from witnessing harm to another, on the ground that the defendant's duty does not extend to a bystander in a place of safety,[32] leaves open the case where the witness is also personally imperilled. If there is to be no recovery for witnessing harm to a third person, it ought to make no difference at all whether the witness is in a place of safety or within the zone of danger. In this respect the Maryland decision in the *Resavage* case represents a misapplication of the "zone of danger" test, for there the test was used as a mechanical device which obscured the real issues of liability or nonliability.

III.

INJURY FROM WITHOUT.

In the leading Massachusetts case on negligently inflicted emotional distress, *Spade v. Lynn & Boston R.R.*,[33] the Massachusetts Supreme

30. 146 Conn. 714, 156 A.2d 149 (1959).
31. *Ibid.*
32. Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952).
33. 168 Mass. 285, 47 N.E. 88 (1897).

Judicial Court laid down "an arbitrary exception based upon a notion of what is practicable"[34] when it held that "there can be no recovery for fright, terror, alarm, anxiety or distress of mind, if these are unaccompanied by some physical injury . . . there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without." The test, "injury to the person from without" has never been satisfactorily defined, and the Massachusetts cases applying it cannot be rationalized in any consistent pattern. Physical injury is not required,[35] rather force or impact no matter how slight,[36] even if not applied to plaintiffs' person,[37] comes the closest to describing the requirement. However where the external stimulus has impinged upon the plaintiff's consciousness in a non-violent way, recovery has been denied in every case. For example in the food cases where the stimulus has been an obnoxious substance which the plaintiff has merely seen[38] or even partially ingested,[39] recovery has been denied. In none of the food cases, however, has the foreign substance been toxic or deleterious in its own right. Presumably if physical injury resulted from the harmful character of the foreign substance itself, recovery would be permitted.[40] Thus the test cannot be defined in terms of force, or of physical injury, and yet not every external stimulus will suffice.

"Injury from without" is an impractical test because it seeks to categorize as either wholly external or wholly the result of mental distress, injuries produced by a process of interaction. Where an external stimulus produces an emotional reaction in the plaintiff either through fright or because of the plaintiff's realization of the external stimulus, it is impossible to differentiate the stimulus from the response to it so as to categorize the cause as either "wholly internal" or as

34. Homans v. Boston Elevated Ry., 180 Mass. 456, 457, 62 N.E. 737 (1902).

35. Driscoll v. Gaffey, 207 Mass. 102, 92 N.E. 1010 (1910) (defendant's blasting damaged plaintiff's house; plaintiff, not physically injured thereby, suffered nervous breakdown); Gannon v. N.Y., N.H. & H. R.R., 173 Mass. 40, 52 N.E. 1075 (1899) (passenger, fleeing fire in railroad car, struck arm against seat, fainted and fell; held sufficient); Spade v. Lynn & Boston R.R., 172 Mass. 488, 52 N.E. 747 (1899).

36. Bell v. N.Y., N.H. & H. R.R., 217 Mass. 408, 104 N.E. 963 (1914); Homans v. Boston Elevated R.R., 180 Mass. 456, 62 N.E. 737 (1902) (a slight blow).

37. Freedman v. Eastern Mass. St. Ry., 299 Mass. 246, 250, 12 N.E.2d 739, 741 (1938). "The phrase 'from without' as used in our cases excludes phychological or emotional consequences when they stand alone, but includes all physical injury not resulting solely from mental shock or emotional disturbance . . . . The proof that it was 'from without' . . . is not restricted to evidence of the application of violence to the person of the plaintiff." Accord: Cameron v. New England Tel. & Tel. Co., 182 Mass. 310, 65 N.E. 385 (1902).

38. Wheeler v. Balestri, 304 Mass. 257, 23 N.E.2d 132 (1939).

39. Sullivan v. H. P. Hood & Sons, Inc., 168 N.E.2d 80 (Mass. 1960); Kennedy v. Brockelman Bros., 334 Mass. 225, 134 N.E.2d 747 (1956).

40. *Id.* at 83.

"injury from without." It is possible to say either that the stimulus was likely to produce emotional distress or that it was not, or that the reaction was normal or was the result of plaintiff's peculiar susceptibility, or that the reaction was disproportionate to the stimulus or that it was not. Construed in this way, the "injury from without" test could conform to usual tort principles. Construed as it is by the Massachusetts court, there is no logical nexus rationalizing the decisions. And as the Massachusetts cases have shown many times over, it is the court which decides whether there has been an "injury from without" and not the jury.

IV.

CHARACTERISTIC SITUATIONS.

A.

WITNESSING OR LEARNING OF DANGER OR HARM TO A THIRD PERSON.

A situation being litigated with increasing frequency is that where emotional distress is suffered by one who observes or learns of peril or actual harm to a third person. The plaintiff is normally the parent of a close relative of the person imperilled or harmed and may or may not be injured or in peril himself. The plaintiff's fear may or may not be entirely fear for the imperilled third person or may or may not be occasioned in part by fear for his own safety. The variations are limited; the results, contradictory.

In those states which adhere to mechanical tests of liability, *i.e.* "physical injury" or "zone of danger", if the onlooker is himself physically injured by the force which imperils or harms the third person, recovery is normally permitted. The most obvious case is that a pregnant woman, where an injury or peril to the fetus — if for purposes of analysis the fetus may be considered a third person — also imperils or injures the plaintiff. Thus fear of injury to an unborn child is part of damages normally allowed an injured woman.[41] Where a plaintiff suffers emotional distress partly from fear for his own safety and partly from fear for the safety of a third person, three alternatives are possible. He may be allowed to recover for the totality of his fear, on the ground that his distress cannot be broken down into its components of personal fear and fear for the safety of the third person, he may recover only for such distress as is attributable to fear for his own safety and not for such of his fear as is attributable to fear for the safety of the third person, or, if fear

41. *E.g.*, Fehely v. Senders, 170 Ore. 457, 135 P.2d 283 (1943).

for the safety of the third person is the preponderant stimulus, he may be denied recovery for all of his distress.

In *Greenberg v. Stanley*,[42] a case in which a mother suffered physical injury and reveloped psychoneurosis as the result of an accident in which she was hit and her child killed, New Jersey (a "physical injury" jurisdiction) allowed recovery "for the entire, inseparable, resulting psychiatric complex, induced partly by the emotionally shocking and unexpected trauma to the plaintiff herself and partly by her simultaneous concern for her injured child."[43] Vermont (also a "physical injury" state) reached a similar result where plaintiff himself was severely injured in an accident in which his hunting companion was electrocuted.[44] The Connecticut court, which applies the "zone of danger" test, apparently apportions the damage. For example in *Strazza v. McKittrick*,[45] defendant's truck struck plaintiff's house with such force that the impact caused the plaintiff to become hysterical. Some time after the impact, plaintiff's husband inquired as to the whereabouts of their child, and plaintiff, fearing that the child might have been injured in the accident, suffered further anxiety. She was permitted to recover for only such of her emotional distress as was the result of fear of injury to herself and not for that resulting from fear of injury to her child, the latter being "too remote in the chain of causation." Indeed the fear for the child was distinctly separate both in point of time and in the manner in which it impinged upon the plaintiff's consciousness. Had the two fears occurred substantially simultaneously perhaps a more difficult problem would have been presented, and the Connecticut court, like the New Jersey court, might have found it impossible to separate "the entire, inseparable, resulting psychiatric complex." Although no case has gone so far as to deny recovery completely where the plaintiff sustains some physical injury, perhaps the most extreme application of a mechanical test to permit recovery for emotional distress resulting from fear of harm to a third person was in *Bedenk v. St. Louis Public Service Co.*[46] In that case plaintiff's child was killed as she and plaintiff alighted from defendant's bus. Although plaintiff suffered only a minor bruise (the bus door closed on her arm), she was permitted to recover $8,000 for physical injury and neurosis resulting from the incident despite the obvious fact that the neurosis had little, if any relation to plaintiff's physical injury.

42. 51 N.J. Super. 90, 143 A.2d 588 (1958), 30 N.J. 485, 153 A.2d 833 (1959).
43. *Id.* at 143 A.2d 597.
44. Humphrey v. Twin State Gas & Electric Co., 100 Vt. 414, 139 Atl. 440 (1927).
45. 146 Conn. 714, 156 A.2d 149 (1959).
46. Bedenk v. St. Louis Public Service Co., 285 S.W.2d 609 (Mo. 1955).

Where the plaintiff himself is not physically injured by the negligence which imperils or harms the third party, recovery is usually denied,[47] sometimes upon the explicit application of the "physical injury" test. In a Maine case, for example, a parent was denied recovery for mental distress suffered as a result of the defendant's erroneous report that her son had been killed in the war, the court specifically noting that a physical injury was required.[48] In an Indiana case, a plaintiff was denied recovery for fright and shock occasioned by fear for the safety of her daughter who was being dragged along a railroad platform by defendant's train, again on the ground that the plaintiff herself sustained no physical injury.[49] The same reasoning was applied in another Indiana case where a wife's nervous shock as a result of witnessing intentional injury of her husband by defendant was deemed noncompensable because the wife herself sustained no physical injury.[50] In New York the physical injury test has also been applied to prevent recovery by a parent for mental anguish sustained from witnessing injury to her child.[51] Approached as a problem of causation, however, the mental anguish of the onlooker does not depend upon whether he is physically injured by the same force which imperils or harms the victim nor whether the onlooker is in the zone of peril or in a place of safety, though both tests have been applied to prevent recovery.[52]

Clearly the results in this area are paradoxical. If plaintiff suffers no physical injury from the force which harms the victim, recovery is denied because of the lack of such physical injury. If, on the other hand, there is some physical injury, recovery has been permitted although the injury to the plaintiff's person may have no causal relation to the distress plaintiff suffered at witnessing the harm to the third person. Although injury to the plaintiff's person may induce an emotional reaction, there is no necessary correlation between that injury and the emotional harm plaintiff may have sustained. Similarly the emotional result does not depend upon the fortuitous circumstance that plaintiff was himself in a zone of danger. Since in the usual case the onlooker is not physically injured by or within the zone of danger of

47. *E.g.*, Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899); Smith v. Village of Plandome, 213 N.Y.S.2d 119 (Sup. Ct. 1961); Nuckles v. Tenn. Electric Power Co., 155 Tenn. 611, 299 S.W. 775 (1927).

48. Herrick v. Evening Express Pub. Co., 120 Me. 138, 113 Atl. 16 (1921).

49. Cleveland, C. C. & St. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900).

50. Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N.E. 860 (1933).

51. Blessington v. Autry, 105 N.Y.S.2d 953 (Sup. Ct. 1951). But see Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).

52. See, *e.g.*, Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952).

the force which harms the victim, application of the mechanical tests to this area is, as a practical matter, a means of denying recovery in the overwhelming majority of such cases. In terms of the division of responsibility between court and jury, little is left to the jury to decide. They need only decide whether or not plaintiff sustained a physical injury, and if he did not, there can be no recovery whatever the other circumstances. The court, by a rule, prevents recovery in all cases save the occasional fortuitous one where the observer is also injured physically.

Of course it is possible for an appellate court to prevent recovery in all such cases by means other than the application of mechanical tests, and many courts have done so. Thus a court may rule that a negligent tortfeasor has no duty toward observers,[53] or that the cause of plaintiff's distress was not the defendant's negligence but the plaintiff's realization of the danger or knowledge of the harm,[54] that is, as a matter of law, emotional distress of a third party is not the proximate result of the defendant's wrong, or that the defendant's wrong was not directed at plaintiff.[55] By the use of such rules, a court relegates to itself the entire responsibility of decision-making in this area; the jury has no role to play at all.

The alternative is the application of standards, the usual tests of proximate causation and foreseeability, which are applied in the first instance by juries, but are subject, however, to judicial review. Since it cannot be said that in every case emotional distress of an observer is not foreseeable or the proximate result of one's negligence toward a third party, the case for the application of the usual tests of foreseeability and causation, rather than the mechanical tests and rules is obvious. Furthermore it is apparent that the mechanical tests have in practice served badly the ends they were instituted to effect, primarily a judicial lid on the "pandora's box" of frightening and speculative claims, not only because meritorious claims have been denied, but also because otherwise speculative and difficult to assess damages have been allowed because of the happenstance that the relevant mechanical test has been met. But would standards serve better? Would judicial review, and the overturning of jury verdicts only in cases where reasonable minds ought not to differ, be a sufficient guarantee of judicial control in this area?

---

53. *E.g.*, Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950).

54. Compare Slough v. Steen, 3 Cal. App. 2d 392, 39 P.2d 889 (1934) with Webb v. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931).

55. Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936) ("willful" act — defendant's intestate had beaten plaintiff's sister to death).

There is a persuasive argument that juries should not be allowed to decide all cases in this area on the basis of usual tort standards, and that there ought to be rules pertaining to the degree of relationship between the observer and the victim to regulate recovery. Unless a court decides to lay down a blanket rule denying recovery to any observer whatever his relation to the victim, which rule could not be justified in terms of foreseeability or causation in every case, it must, if it is to avoid mechanical tests, decide upon the degree of relationship within which recovery by an observer is to be permitted. This the jury ought not be permitted to do. One jury, for example, ought not to be allowed to permit recovery by an observer who is a close friend of the victim while another jury denies recovery in a similar case solely on the ground that it is not foreseeable that a close friend of the victim will suffer emotional distress. Consistency of result is more than merely a benefit to those who set insurance rates, it is desirable, indeed a necessity within the legal order. Rules, therefore, have a place in this particular class of emotional distress cases, as do standards.

The courts, dealing with the problem on a case to case basis, should determine the degree of relationship between the observer and the victim necessary to permit recovery, with as much consistency as this method will allow. Then, once it is established, for example, that a mother may recover for her distress at witnessing harm negligently caused to her infant child, the jury would then be permitted to apply the standards of proximate causation to the particular circumstances of the case and permit or deny recovery, subject, as usual, to judicial review of the reasonableness of their application of the standards in any particular case. In this class of cases, then, both the general standard and the particular rule have a place; the rule to determine the degree of relationship within which recovery is permitted, the standards to determine the outcome within the limits of allowable recovery. Such a scheme would enable the judiciary to maintain control over litigation in this area, first, by limiting the scope of the defendant's duty, and second, by reviewing the particular application of standards to fact by the jury. Such a scheme would also avoid the unfortunate features of the results obtaining under the mechanical tests.

In a related class of cases involving the mutilation or mistreatment of the corpse of a deceased relative, courts have achieved conflicting results by a variety of methods. The confusion has stemmed in part from a debate over the applicability of the requirement of "physical injury". Where the wrong has involved an intentional act, recovery

for the unintended but foreseeable emotional distress to the plaintiff has usually been allowed.[56] On the other hand where the wrong is negligent, these courts which apply the "physical injury" test in emotional distress cases have fought a Quixotic battle over its applicability to this class of cases. Some deny recovery because the requirement is not met;[57] some apply the test and permit recovery apparently on the ground that physical injury to the corpse suffices;[58] some explicitly hold the test inapplicable.[59] Of course, application of the "physical injury" test (or any other mechanical test) is as illogical in this class of cases as in the others, for the essence of damage is the emotional distress of the plaintiff and any physical injury to him or to the body of a deceased relative is causally irrelevant. But courts seem to be more willing to allow recovery for distress occasioned by the mistreatment of a corpse than in other areas of negligently inflicted emotional distress.[60] Rejection or relaxation of the physical injury requirement means that many courts appear to be willing to allow the jury a greater role in the decision-making process in this area, probably because of a feeling that the danger of fictitious or exaggerative claims is at a minimum in the corpse cases and the harm occasioned highly expectable. The results compared with those in the cases involving witnessing harm or danger to living persons are often paradoxical. A simple illustration will suffice. If a motorist is struck by defendant's automobile and is pinned in its wreckage, in those states which apply mechanical test, the motorist's wife would have no cause of action for her anxiety at witnessing the accident if she herself was neither injured nor within the "zone of danger". But if the motorist is killed and in extricating his body, defendant negligently mangles it, in those states which relax or reject the physical injury requirement in case of mutilation of corpses recovery is allowed despite the fact that the wife was neither physically injured nor within the "zone of danger".[61]

56. *E.g.*, Brownlee v. Pratt, 77 Ohio App. 533, 68 N.E.2d 798 (1946) (requirement of physical injury held not applicable to intentional invasion of right to burial); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925) (detention of corpse to enforce payment of bill).

57. *E.g.*, Nichols v. Central Vt. Ry., 94 Vt. 14, 109 Atl. 905 (1919); Kneass v. Creamation Soc. of Wash., 103 Wash. 521, 175 Pac. 172 (1918).

58. *E.g.*, Awtrey v. Norfolk & W. Ry. Co., 121 Va. 284, 93 S.E. 570 (1917). See Nichols v. Central Vermont Ry. Co., 94 Vt. 14, 109 Atl. 905 (1919) (dissenting opinion).

59. *E.g.*, Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N.E.2d 360 (1938) (unauthorized autopsy).

60. See cases collected in GREEN, MALONE, PEDRICK & RAHL, INJURIES TO RELATIONS 251-60 (1959).

61. *Cf.*, Blanchard v. Brawley, 75 So. 2d 891 (La. App. 1954). It is interesting to note that Louisiana permits recovery in emotional distress cases generally and does not adhere to any mechanical requirements. McGee v. Yazoo M. V. Ry., 206 La. 121, 19 So. 2d 21 (1944); Humphries v. Delta Fire & Casualty Co., 116

Recovery in such cases serves as contrast to the judicial mistrust which has prompted courts to apply mechanical rules in cases where harm to living persons is observed.

B.

ESCAPING FROM DANGER CASES.

One situation which has given courts great difficulty is that where a plaintiff suffers harm in escaping or attempting to escape from an actual or supposed danger brought about by defendant's negligence. The harm may be a physical injury occurring during the escape due to the plaintiff's haste to flee, or it may be a physical injury induced by the fright at the peril and the excitement of the attempt to flee. The judicial results in this area have been diverse and the theories adduced to handle the problem irreconcilable.

The experience of two states, Ohio and Pennsylvania, both of which apply the "physical injury" test to all categories of negligently inflicted emotional distress, is enlightening. In *Potere v. City of Philadelphia,*[62] a truck driver was allowed to recover for both physical injury (a hernia) and mental anguish sustained when he was compelled to jump from the cab of his truck due to defendant's negligent maintenance of a street. Apparently the mental distress was in no way caused by the physical injury, which was slight, but rather by the realization of the peril. It is reasonable to assume that that realization and fright would have occurred even in the absence of a physical injury, but the Pennsylvania court seized upon the injury as a ground upon which to base a much larger recovery. In a rather similar Ohio case,[63] a person trapped in a burning building because of the negligence of the defendant in failing to provide a fire escape was allowed to recover for emotional distress due to realization of his plight, which realization continued to haunt him even after the incident, on the ground that inhalation of smoke was sufficient to satisfy the requirement of a "physical injury." Although the two cases differ in that in the one the physical injury occurred during the escape and in the other it occurred because escape was thwarted, both cases illustrate the extent to which these courts were willing to go to find

So. 2d 130 (La. App. 1959); Quina v. Roberts, 16 So. 2d 558 (La. App. 1944). One plausible explanation is that the Louisiana appellate courts apply a "manifest error" standard review jury determination of fact freely, and thus retain a greater degree of control over juries than do other jurisdictions; hence the apparent lack of concern by the Louisiana courts over the dangers of fraud and exaggeration in emotional distress cases.

62. 380 Pa. 581, 112 A.2d 100 (1955).

63. Morton v. Stack, 122 Ohio St., 115, 170 N.E. 869 (1930).

that the requirement of physical injury had been met. Had damages been confined to the physical loss sustained, the substantial emotional damage which in each case was the important injury, would have been denied. In each case the court avoided the harsh result required by a strictly applied mechanical test by stretching the rule so as to achieve a just result. In *Potere,* the Pennsylvania court could have applied the rule strictly and denied recovery since the injury was not the direct result of the same force which produced the peril, and in the Ohio case, the court could have held that the inhalation of smoke was too negligable in terms of physical injury resulting from the imperilling force to warrant recovery.

Two later cases from the same jurisdictions provide an illuminating contrast to these earlier decisions. In *Bosley v. Andrews,*[64] a divided Pennsylvania court denied recovery for a heart attack suffered by the plaintiff as the result of fear and exertion sustained in attempting to escape from a charging bull negligently allowed to trespass on plaintiff's land. In an analogous Ohio case,[65] death resulting from a heart attack sustained by a woman forced to flee her home because of the spread of a negligently caused fire was deemed noncompensable.[66] In both cases the injury resulting from the fright, in one case a heart attack and in the other, death following a heart attack, was not deemed sufficient to meet the requirement of a "physical injury". Of course at first blush it seems rather paradoxical that, for the purpose of satisfying the physical injury requirement, Pennsylvania regards a hernia as a "physical injury" but not a heart attack, and that Ohio regards inhalation of smoke as "physical injury" but not death. And surely, in terms of the alleged reason for the requirement, *i.e.* timidity in unlocking the fearful "Pandora's box" of fictitious claims, it is hard to imagine that either a heart attack or death would be a means plaintiffs would willingly undergo in the promotion of fraudulent claims, at least not more willingly than a hernia or the inhalation of smoke. Some courts, realizing this, do recognize that a physical injury produced by fright during an escape is sufficient to meet the requirement of the test. For example in the recent case of *Usry v. Small,*[67] the Georgia court, while adhering to the rule that there can be no recovery for fright unattended by a physical injury, stated that if the fright produces

64. 393 Pa. 161, 142 A.2d 263 (1958).
65. Barnett v. Sun Oil Co., 172 N.E.2d 734 (Ohio App. 1961).
66. It is unclear from the decision whether the basis is the unforseeability of the result, (Compare Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So. 2d 780 (1942), or the lack of impact. The court does note, however, that "in a negligence case there can be no recovery for fright or shock unaccompanied by physical injury".
67. 103 Ga. App. 144, 118 S.E.2d 719 (1961).

physical injury, there may be recovery (if, of course, the tests of foreseeability and proximate causation are met). But some "physical injury" jurisdictions apparently require that the physical injury, if it is to meet the requirement of the test, must be produced "directly", that is, by the impingement of the same force which creates the peril, or occur as a "direct" result of the escape attempt. Apparently this means that the injury must not "result" from the "intervening" fear which the peril has incited. Thus in Mrs. Bosley's case, the heart attack was presumably thought to be the result of fear at her dilemma, rather than a result of her escape. Had she jumped out of the way of the rampaging bull and sprained an ankle, presumably she would have been allowed to recover for her mental distress as well as her ankle on the authority of the *Potere* case. Logically it is difficult to distinguish between the cases because in both an "intervening" mental process is involved in the reaction to the peril. In the *Potere* case it was the plaintiff's realization of his peril which prompted his action in escaping and in the course of escaping he was physically injured. In *Bosley*, if it may be assumed that the plaintiff's heart attack was the result of fear at her peril (rather than of her exertion in escaping — which latter case is even more closely analogous to *Potere*), it is still difficult to see why her fear was more of an "intervening" cause than was Potere's realization of his plight. It is interesting to note that the two more recent decisions in Ohio and Pennsylvania appear to hark back to a more strict definition and application of the "physical injury" test and display quite a different spirit than the earlier decisions which seemed to bend the logic of the tests to achieve a just result.

No matter how construed — whether as to requiring a physical injury in an escape precipitated by plaintiff's realization of peril, or as allowing recovery where fright has produced physical symptoms — the physical injury test binds the hands of both judge and jury. Not only is the jury confined to deciding only whether there has been a physical injury of the sort defined by the court's interpretation of the test, but also the court itself is limited to permitting recovery only where the test as defined is met, regardless of the foreseeability of the result and regardless of the fact that the result may have been the natural and proximate result of the wrong. Of course, not all courts adhere to the test in this type of case. The Supreme Court of Washington, to cite just one example, specifically rejected the test in an escape case as early as 1916.[68] The alternative is application of the general standards of foreseeability and causation. Each case would then be

68. O'Meard v. Russell, 90 Wash. 557, 156 Pac. 550, 552 (1916).

decided on its own merits and courts would still be able to control the decision-making process. If fear of fictitious claims is a worry, it would be possible for a court, on the facts of any particular case, to decide that no reasonable jury could find the fear (and its physical consequence) a close result of the wrong.[69] Not only have courts adopted a rule — or more precisely one of two rules depending upon whether the physical injury is a direct result of the escape or is produced indirectly by fear — but they have adopted a rule which, considering the fact situation of an escape case, is inappropriate, for the gist of the damage normally is the emotional distress, the fear incited by peril, rather than a fortuitous physical injury. Furthermore the rules adopted serve particularly badly in this area in terms of the paradoxical and inconsistent results produced. Perhaps it is time for those courts which now rigidly apply the "physical injury" test in an effort to control litigation in this area to consider whether or not the same degree of control could be achieved by judicial review of jury application of the usual tort standards.

C.

FOOD CASES.

The typical food case involves a foreign[70] or obnoxious substance[71] which may contaminate the food[72] or do some slight physical damage to the plaintiff,[73] but which is normally neither toxic or harmful in itself.[74]

69. *E.g.*, Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So. 2d 780 (1942).

70. *E.g.*, Coca-Cola Bottling Co. v. Langston, 198 Ark. 59, 127 S.W.2d 263 (1939) (fine particles of glass in soft drink); Medeiros v. Coca-Cola Bottling Co., 59 Cal. App. 2d 707, 135 P.2d 676 (1943) (cleaning brush); Tuttle v. Meyer Dairy Products Co., 138 N.E.2d 429 (Ohio App. 1956) (piece of glass in cheese); Clark Restaurant Co. v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931) (glass).

71. Paul v. Rodgers Bottling Co., 183 Cal. App. 2d 680, 6 Cal. Rptr. 867 (1960) (mouse in soft drink); Connell v. Coca-Cola Bottling Co., 187 Kan. 393, 357 P.2d 804 (1960) (decomposed centipede in soft drink); Sullivan v. H. P. Hood & Sons, Inc., 168 N.E.2d 80 (Mass. 1960) (remains of mouse and fecal matter in milk); Kennedy v. Brockelman Brothers, Inc., 334 Mass. 225, 134 N.E.2d 747 (1956) (worm in can of corn); Wheeler v. Balestri, 304 Mass. 257, 23 N.E.2d 132 (1939) (dead cockroach in bread); Kenney v. Wong Len, 81 N.H. 427, 128 Atl. 343 (1925) (mouse in roast chicken); Sider v. Reid Ice Cream Co., 125 Misc. 835, 211 N.Y. Supp. 582 (Sup. Ct. 1925) (cockroaches in charlotte russe); Wolfe v. Great A. & P. Tea Co., 143 Ohio St. 643, 56 N.E.2d 230 (1944) (worm in peaches); Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P.2d 84 (1952) (decomposed mouse in soft drink); Koplin v. Louis K. Liggett Co., 322 Pa. 333, 185 Atl. 744 (1936) (centipede in soup); Menaker v. Supplee-Wills-Jones Milk Co., 125 Pa. Super. 76, 189 Atl. 714 (1937) (mouse in ice cream).

72. *E.g.*, Wolfe v. Great A. & P. Tea Co., 143 Ohio St. 643, 56 N.E.2d 230 (1944) (question of fact for jury whether worms contaminated entire contents of can of peaches); Menaker v. Supplee-Wills-Jones Milk Co., 125 Pa. Super. 76, 189 Atl. 714 (1937) (ice cream held contaminated by mouse).

73. *E.g.*, Coca-Cola Bottling Co. v. Langston, 198 Ark. 59, 127 S.W.2d 263 (1939) (fine particles of glass caused tiny abrasions); Clark Restaurant Co. v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931) (cuts sustained by swallowing glass in food).

The substance may be merely observed,[75] partially or wholly ingested,[76] swallowed,[77] or expelled,[78] or part of the food which contains the foreign substance may be ingested although the substance itself never reaches the plaintiff's mouth.[79] The reaction to the incident may be merely the usual disgust, nausea and vomiting[80] or further sickness may result.[81] Although there are many variations, the basic process is substantially the same in every case: realization of the obnoxious matter in the food produces a feeling of revulsion, disgust and perhaps fear in the plaintiff which evokes certain responses, normally nausea and vomiting and sometimes further emotional and physical distress. It is always the interaction of stimulus and response, involving an awareness by the plaintiff of the stimulus and the realization of its foreign or obnoxious character.

To such a process, none of the mechanical tests are logically appropriate. Their application more often than not results in a futile and unnecessary attempt to characterize as "physical" or "emotional", or as "injury from without" or as not "from without", harms produced in the interaction between the internal response to the external stimulus. In those states which adhere to the "physical injury" test, the application of that test to food cases has produced weird reasoning. If the foreign substance has itself produced immediate physical harm, recovery has been allowed for all the consequences of the incident, including the "physic" reactions, even though the immediate physical harm produced is very minor and has little effect in producing the total

74. *E.g.*, Sullivan v. H. P. Hood & Sons, Inc., 168 N.E.2d 80, (Mass. 1960) (remains of mouse and its fecal matter itself produced "no deleterious effect"); Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P.2d 84 (1952) (decomposed mouse not toxic).

75. "The plaintiff cannot recover for any physical injury she sustained solely by her mental disturbance upon seeing a worm contained in the corn sold by the defendant." Kennedy v. Brockelman Brothers, Inc., 334 Mass. 225, 227, 134 N.E.2d 747, 748 (1956), despite evidence that plaintiff has swallowed half the worm. See also Koplin v. Louis K. Liggett Co., 322 Pa. 333, 185 Atl. 744 (1936).

76. Sullivan v. H. P. Hood & Sons, Inc., 168 N.E.2d 80 (Mass. 1960) (plaintiff felt some of matter in throat); Menaker v. Supplee-Wills-Jones Milk Co., 125 Pa. Super. 76, 189 A. 714 (1937).

77. Clark Restaurant Co. v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931) (glass swallowed).

78. Tuttle v. Meyer Dairy Prods. Co., 138 N.E.2d 429 (Ohio App. 1956) (plaintiff expelled glass in cheese without swallowing it).

79. Paul v. Rodgers Bottling Co., 183 Cal App. 2d 680, 6 Cal. Rptr. 867 (1960) (plaintiff took three or four swallows of soft drink containing dead mouse).

80. *E.g.*, Medeiros v. Coca-Cola Bottling Co., 57 Cal. App. 707, 135 P.2d 676 (1943); Sider v. Reid Ice Cream Co., 125 Misc. 835, 211 N.Y. Supp. 582 (Sup. Ct. 1925); Tuttle v. Meyer Dairy Products Co., 138 N.E.2d 429 (Ohio App. 1956).

81. The further sickness may be manifested physically, *e.g.*, Sullivan v. H. P. Hood & Sons, Inc., 168 N.E.2d 80 (Mass. 1960) (neurodermatitis and elevation of Blood pressure); Kenney v. Wong Len, 81 N.H. 427, 128 A. 343 (1925) (physical suffering); or by further mental disturbance, *e.g.*, Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P.2d 84 (1952) (phobia for all types of soft drinks dispensed in bottles and for places where such drinks were served).

reaction. In an Arkansas case,[82] for example, recovery was allowed for nausea and physical injury sustained by plaintiff after drinking a soft drink containing fine particles of glass which caused tiny abrasions, although there was little relation between the abrasions and the reaction. If the substance has contaminated the food, recovery has been allowed in some "physical injury" states on the ground that the contamination can produce physical injuries, even though there is no showing that it did in the particular case or on the ground that realization of the physical effects of the contamination produced the total emotional and physical result. In one Pennsylvania case,[83] for example, the requirement of physical injury was held to have been satisfied upon evidence that ice cream which the plaintiff had eaten had been contaminated by the presence of a mouse so that plaintiff's ailment was not purely of psychic or nervous origin. (Elsewhere, the presence of decomposed mice in food is not sufficient to contaminate food nor to produce toxic effects sufficient to satisfy the physical injury requirement.[84]) Some states, rather than looking at the immediate physical results produced by the foreign substance (*i.e.* abrasions, contamination and the like), look instead at the overall consequences produced, and attempt to categorize them as "physical" or "nonphysical", with, as one would expect, contradictory results. In most states the normal complex of reactions, (nausea, vomiting, nervousness, mental anguish) is not "physical injury" within the meaning of the test.[85] There are instances, however, where a court explicitly recognizing that the reactions are both emotional and physical, have characterized them as "physical" for purposes of the test. In a Kansas case,[86] for example, a plaintiff who had consumed a portion of soft drink from a bottle containing a decomposed centipede and had suffered nausea, vomiting and physical illness was permitted to recover, the court noting that in such cases psychological distress and physical distress are "inseparable."

Such attempted categorization, which is the necessary result of applying the "physical injury" test to a class of cases to which it is ill adapted, is worse than useless because it obscures the real issue, which, broadly stated, is whether the particular harm ought to be compen-

82. Coca-Cola Bottling Co. v. Langston, 198 Ark. 59, 127 S.W.2d 263 (1939).

83. Menaker v. Supplee-Wills-Jones Milk Co., 125 Pa. Super. 76, 189 Atl. 714 (1937).

84. *E.g.*, Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P.2d 84 (1952); Van Hoy v. Coca-Cola Bottling Co., 205 Okla. 135, 235 P.2d 948 (1951).

85. *E.g.*, Tuttle v. Meyer Dairy Prods. Co., 138 N.E.2d 429 (Ohio App. 1956); Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P.2d 84 (1952); Koplin v. Louis K. Liggett Co., 322 Pa. 333, 185 Atl. 744 (1936).

86. Connell v. Coca-Cola Bottling Co., 187 Kan. 393, 357 P.2d 804 (1960). See also Paul v. Rodgers Bottling Co., 183 Cal. App. 2d 680, 6 Cal. Rptr. 867 (1960); Dryden v. Continental Baking Co., 11 Cal.2d 33, 77 P.2d 833 (1938).

sated. It does not matter whether a piece of glass in the plaintiff's dish of beans cut his mouth and thereby produced an "immediate physical injury" or did not cut his mouth and therefore produced no such injury if the important harm the plaintiff suffered from the incident was elevated blood pressure. That he should recover in one case and not in the other is of course nonsensical. Must the test of "physical injury" be interposed so that the crucial issue to be decided becomes whether nausea is a "physical" or "emotional" reaction, when in reality the issue is whether the alleged nausea is compensable? The resolution of that broader, more important issue ought not to be obscured by an inquiry into whether or not nausea is a physical injury.

Whether a particular harm ought to be compensable ought not to depend upon how it is categorized, but rather upon the usual tests of foreseeability and causation. The test ought not to be whether there was a physical injury, but whether the injury which did occur (be it physical, emotional or, more properly, both) was the natural and proximate result of the defendant's negligence. This question is often a particularly difficult one to resolve in the food cases. Often the total reaction is of a grevious sort. Often it is the peculiar sensitivity of the plaintiff which reacts to the stimulus of the obnoxious matter in a particularly emotional way. But these are not reasons for discarding the usual causation test. If the reaction which occurs is wholly disproportionate to the stimulus or is abnormal in the sense that an ordinary person would not react to it or would not react to it in the way the plaintiff did, then it would be possible, under a causation test, properly framed, to deny recovery.

The "injury from without" test as interpreted in Massachusetts is likewise inappropriate to food cases, although it has been applied to deny recovery in such cases.[87] It is clear that under the test as construed by the Massachusetts court there can be no recovery for the effects of seeing or ingesting obnoxious matter in food (at least if the matter did not produce any immediate physical effects such as abrasions by glass), no matter how normal the reaction and regardless of the fact that "physical" harm was produced through the intervening consciousness of the plaintiff. It would appear that the only situations deemed compensable under the Massachusetts test are those where the foreign substance either contaminates the foods and thereby produces a physical reaction, or is of such a character that physical injury is produced. If these are the only compensable situations, the test, as

87. Sullivan v. H. P. Hood & Sons, Inc., 168 N.E.2d 80 (Mass. 1960); Kennedy v. Brockelman Bros., 334 Mass. 225, 134 N.E.2d 747 (1956); Wheeler v. Balestri, 304 Mass. 257, 23 N.E.2d 132 (1939).

applied, is open to the same criticism directed to the "physical injury" test; namely, that the "immediate physical injury" need bear little relation to the total reaction produced.

D.

INDIGNITIES.

In a recent Oklahoma case[88] a woman sought to recover damages for mental anguish, humiliation and embarrassment occasioned by the defendant's failure to deliver her wedding gown and veil in time for her wedding. In reversing a judgment for plaintiff, the Supreme Court of that state analyzed the problem as one under the general rubric of "mental anguish" to which the requirement of a physical injury was applicable, and since there was no physical injury, plaintiff was not allowed to recover for her distress of mind. The case illustrates both the need for a differentiation among the types of harms still largely lumped together in one general and obscuring category, "emotional distress", and the futility of attempting to apply indiscriminately the mechanical tests to all types of "emotional distress" cases. The essence of the damage in the Oklahoma case is, of course, the bride's humiliation at having to wear street clothes at her wedding. Had a physical injury also resulted from her humiliation, it would have been mere happenstance. And certainly the wrong which was done to her was not of a forceful character likely in itself to produce a direct physical injury. Application of the "physical injury" test in such a case has an Alice-in-Wonderland quality about it, because physical injury is not normally the likely result of the type of wrong committed. It is not as likely as it is, for example, in cases where a plaintiff is put in fear of violence, or attempts an escape from danger. It is a hurt to one's pride, not jeopardy to one's physical safety. It may well be, of course, that the Oklahoma court is reluctant to allow recovery for the sort of "emotional distress" which is merely a hurt to the ego, but to deny recovery on the ground that there was no accompanying physical injury is totally inappropriate.

The real question in such cases is not whether there was a physical injury, or whether the plaintiff was in a "zone of danger," or whether there was an impact, but whether there ought to be recovery for indignity, abuse, humiliation, or embarrassment. Such harms are quite distinct from other sorts of harm characterized generally as "emotional distress." Where indignity or humiliation is the harm, it is the plaintiff's consciousness of the insult or the wrong and his sensitivity to it

88. Seidenbach's Inc. v. Williams, 361 P.2d 185 (Okla. 1961).

which gives rise to a deliberative reaction to the wrong. It is not so automatic a reaction, for example, as fright, or nausea from obnoxious matter in food, or an attempt to escape from peril, nor is it as readily foreseeable as these more automatic reactons. Not everyone is necessarily humiliated by an insult, but few parents would not suffer immediate and agonizing distress at witnessing harm or peril to their children. Whether there ought to be recovery for mere indignity or embarrassment should be a question for courts, rather than juries to decide, for it is here that the spectre of the flood of fanciful claims is most haunting. Indeed it was probably the area of humiliation and indignity that the courts had in mind in the early cases which adopted mechanical tests to limit liability to more concrete types of claims, specifically to those involving some physical injury. But applied to this area, the test has no relevance; it is merely a devious method of denying recovery. If recovery is to be denied, it ought to be done in a forthright manner, and not by the application of a test which involves mere happenstance.

E.

PRE-EXISTING SUSCEPTIBILITY.

It is elementary in the law of torts that a negligent tortfeasor "takes his victim as he finds him," in other words a wrongdoer will not be exculpated from liability for untoward consequences peculiar to a plaintiff with a pre-existing susceptibility.[89] Where the damage inflicted is emotional distress, rather than a purely physical injury, application of this elementary rule would in many cases result in recoveries greatly disproportionate to the wrong done. Indeed, those courts which deny recovery where fright has induced physical consequences on the ground that the fright is a cause intervening between the negligence and the consequences are on even surer ground when the victim is susceptible to emotional distress. In all emotional distress cases there is, of course, a process of interaction between the frightening or humiliating external stimulus and the consciousness which reacts to it. In the case of fright, where the response is almost a reflex, that is, without conscious deliberation, it makes little sense for a court to characterize the fright as an intervening cause cutting off liability. In the case of nauseating or disgusting stimulus, common in the food cases, the mental reaction on the victim's part plays a somewhat more deliberative role, at least to the extent that there is a realization of the stimulus and its nauseating character. But in the case where the victim has a pre-existing suscepti-

89. Restatement, Torts § 461 (1934).

bility, neurosis, fear, or phobia the subjective reaction looms larger in the circle of cause and effect, and it is not unrealistic for a court to say that liability ceases where the damage is substantially the result of an unusual sensitivity or pre-existing susceptibility.

If the problem of fright which is a more or less automatic and certainly foreseeable reaction plagues courts which adhere to mechanical rules in emotional distress cases, conversely the problem of the plaintiff with a susceptibility to emotional distress plagues courts which reject the mechanical rules. The rule that a tortfeasor "takes his victim as he finds him" should not be applied to plaintiffs whose susceptibilities precipitate unforeseeable reactions. The problem, however, is whether it is wiser to limit liability by a mechanical rule or permit the flexibility of a standard. Restated, the problem is who, judge or jury, ought to decide where liability ends in cases where the victim's distress results in some part from his own susceptibility.

Some courts explicitly apply the rule that the tortfeasor takes his victim as he finds him to all emotional distress cases.[90] Others avoid the rule by a "proximate cause" analysis where the susceptible plaintiff's emotional distress is wholly disproportionate to the wrong.[91] One court applies the rule with the explicit reservation that it may step in and hold as a matter of law that there is no liability "in cases so extreme that it would shock the conscience of society to impose liability."[92] "Conscience of society" is obviously synonymous with the "conscience of the court" under the test. Clearly, it is possible for a court to allow a jury to apply the general rule and yet retain a modicum of control over any "shocking" results thereby attained.

V.

CONCLUSIONS.

The tests, which are divergent in their theoretical bases, inconsistently applied, and misapplied to situations where their purposes are not apt, lead to results, which, to a layman of ordinary intelligence, must appear hopelessly inconsistent. A mother in Connecticut or Maryland may recover for the consequences of fear for her own safety if she is within the "zone of danger" of a negligently operated vehicle, but not for the consequences of her horror at witnessing the death of her

90. *E.g.*, Sloane v. Southern Calif. Ry., 111 Cal. 668, 683, 44 Pac. 320, 323 (1896).
91. *E.g.*, Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960) (plaintiff's pre-existing dread of killing child on bicycle with her automobile evoked "pseudo-paralysis" when excited in minor automobile accident; recovery denied).
92. Colla v. Mandella, 1 Wis.2d 594, 85 N.W.2d 345 (1957), 271 Wis. 145, 72 N.W.2d 755 (1955).

child by such a vehicle if she herself is in a place of safety.[93] In Massachusetts or Pennsylvania she cannot recover for fright where there is no impact or direct physical injury, even though she may be in the zone of danger, and even though fear for her own safety may have immediately resulted in the most dreadful physical consequences.[94] In Vermont the same requirement of a direct physical injury or impact obtains,[95] except in the case of a mother hen[96] (apparently on the ground that there is little danger of hens simulating injury). The Iowa court, on the other hand, sees no reason why the same rule (immediate personal injury) should not be applied to animals.[97] If a diner in Massachusetts partially eats a mouse in his food he may not recover for his emotional distress nor for any physical consequences which may be produced by that distress because there has been no "injury from without".[98] If, however, he had dined in a restaurant over the border in New Hampshire he could have recovered under the same circumstances.[99]

It is possible to understand, if not to reconcile, the divergent tests when they are viewed as an exercise of the courts' rule making function as interpreted by the various courts. The premises upon which the courts have acted in the area of emotional distress are often not articulated, and apparently not thought out. At times, however, they are articulated although with varying degrees of explicitness. Thus, when Justice Holmes said that the "injury from without" limitation is an "arbitrary rule based upon notions of what is practical", he meant, of course, that the limitation was based upon *the court's* notion of what is practical, or what is impractical for jury determination. A very different concept of the judicial function has been expressed, for example, by the Alabama court. "[If] a person's rights have been unlawfully invaded, it would ill become a court of justice to withhold its remedy on the ground of expediency. It may be that physical injuries which spring out of fright are easily simulated, and relief granted in such instances would open the door to fraud and imposture; but this is a matter involving the proof of a case and is addressed rather to the group sense in honesty of purpose of our juries than to the courts."[100] Connecticut adopts an intermediate position, that

93. Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959).
94. Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).
95. Nichols v. Central Vt. Ry., 94 Vt. 14, 109 Atl. 905 (1919).
96. Thompson v. Great Mountain Power Corp., 120 Vt. 478, 144 A.2d 786 (1958).
97. Lee v. City of Burlington, 113 Iowa 356, 85 N.W. 618 (1901).
98. Sullivan v. H. P. Hood & Sons, Inc., 168 N.E.2d 80 (Mass. 1960).
99. Kenney v. Wong Len, 81 N.H. 427, 128 Atl. 343 (1925).
100. Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 318, 73 So. 205, 207-08 (1916).

whether harm from fright is a compensable result of the defendants negligence may in some situations be a matter of fact, in others, a matter of law.[101] But whether expressed or assumed, it is always how the court conceives of its function in relation to the fact finder that underlies the tests that it adopts in this area.

It is, of course, easy to look at the results in specific cases and argue that because the result was unjust or the test inappropriate, the court misconceived its judicial function by adopting the test. One can argue, for example, that Mrs. Bosley ought to have recovered for the heart condition brought about by her escape from the horns of the rampaging bull, and because there ought to have been recovery, the test was inappropriate; that it is not the place of a court to set up a test which requires the direct physical injury without intervening consciousness of peril; that facts are for the jury and if reasonable minds might differ as to whether the result ought to have been foreseeable or was the natural and proximate result of the wrong, then the court impinged upon the province of the jury with unjust results. But it is possible to examine the tests from another point of view, that of judicial administration of justice, and by delineating what the role of the courts ought to be in this area to make a judgment of what tests best accord with that role. Of course, these approaches are not entirely dichotomous or mutually exclusive. Justice between the parties to a law suit may coincide with what is justice in the mass of individual cases that comprise an entire area of the law, but not necessarily. It is possible to look at the areas which comprise the rubric of "emotional distress" and to test the rules according their utility in each area.

What ought to be the division of responsibility between judge and jury in emotional distress cases? A categorical answer is not possible because the area includes within it many different types of injuries to which different considerations ought to apply. In certain types of cases the plaintiff's subjective reaction to the external stimulus is typically immediate, reflexive, and unpremeditative. Thus where the plaintiff is injured by a physical force, fright is the usual reaction. So also an attempt to escape requires little meditation, and physical injury consequent upon the fright or the escape is readily foreseeable. In other cases the reaction may be slower, more brooding and a result of conscious mediation as for example, the humiliation, embarrassment and indignity cases. Other cases fall in the middle and the reaction is neither reflexive nor the result of a continued period of conscious deliberation. Thus, for example, the case of a plaintiff who becomes

101. Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941).

nauseous at realizing that he has ingested obnoxious matter in food, although his consciousness of the facts plays a causal role in his distress, the process is neither as reflexive as fear nor as meditative as embarrassment.

What unifies the so-called "emotional distress" cases is that in every such case the distress is produced by the concomitance of the external stimulus negligently set in motion by the defendant and the plaintiff's awareness of and reaction to that stimulus. Emotional distress is not possible without both the stimulus and plaintiff's reaction to it. It is not realistic to characterize either as sole cause; it is possible, however, to denominate either as the predominating cause.

The mechanical tests, ("physical injury," "injury from without," and "zone of danger"), originated in a feeling on the part of some courts and judges that emotional distress recoveries must be limited to the realm of the "practical." The impracticality involved may be broken down into three types: (1) emotional distress claims are easy to feign and to exaggerate; (2) they are difficult to assess in monetary terms; and (3) they may be disproportionate to the wrong done and hence unforeseeable because (a) they result from a pre-existing susceptibility on the part of the victim, or perhaps, more importantly, (b) they result predominantly from the intervening consciousness and reaction of the victim, rather than from the defendant's negligence.

As to the danger of fictitious claims, the answers are so obvious and have been given so many times as to suggest that this argument is little more than make-weight. The same dangers, of course, exist in all tort cases; credibility is in any event for the jury; and an appropriate remedy, higher standards of proof, is readily available.[102] Nor is the difficulty of assessing damages a compelling impracticability. The same difficulty exists in all personal injury cases, especially where pain and suffering is involved. The basis of the judicial fear in the mechanical test states is, inferably, that the resulting emotional dis-

102. The New York Court of Appeals, in reversing its previous position and substituting standard for rule, has followed just such a remedy. In Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E. 729 (1961), overruling Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896), the Court, in substituting the general standard that a wrongdoer is responsible for the natural and proximate consequences of his misconduct for the physical injury rule, recognizes that "[i]n the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims." It suggests that, under the New York County Supreme Court Special Rules for Medical Examinations in Personal Injury Actions, the trial court may appoint an impartial medical expert "when necessary for a just determination of the case." Clearly, the Court of Appeals did not consider replacement of the rule with the standard would necessarily leave determinations of emotional distress cases at large, nor that the judiciary would thereby be precluded from playing an active role in such determinations.

tress may be wholly disproportionate to the wrong done. The purpose of the mechanical tests is to obviate the "impracticality" of allowing recovery for distress which is predominantly the result of the plaintiff's own reaction, for distress which results in large part from his peculiar sensitivity, or for distress of so grave a character that it is unforeseeable by any measure. The basic difficulty with the tests is that they are crude and unsophisticated tools for these purposes. Whether the plaintiff's reaction, rather than the defendant's negligence, is a predominating cause of the distress, does not depend upon whether there was or was not a physical injury or whether plaintiff was or was not within a zone of danger. It depends upon the character of the wrong and nature of the reaction. If the wrong is such that the normal reaction to it is immediate and reflexive, there ought to be recovery for the distress produced. Conversely, where the wrong is of such a character that only an abnormal or deliberative reaction would produce the stress, recovery ought to be denied. These determinations ought to depend upon an analysis of the type of situation involved and the type of distress produced. The type of "practical" claim probably intended to be permitted by application of the mechanical tests is that which involves reflexive rather than deliberate distress, and that type more often than not involves either an immediate, accompanying, physical injury or injury from without, or involves situations where the plaintiff is within a zone of danger. The type of "impractical" claim probably intended to be discouraged by the tests is that where there is no immediate physical hurt to the plaintiff and his distress is probably the result of his own intervening, deliberative reaction or his own pre-existing sensibility. Differentiation among the types of distress in the various characteristic situations could better be accomplished by application of the general standards and principles of foreseeability and causation, with the limited use of rules in the particular situations where their use appears warranted (as, for example, in situations where plaintiff witnesses harm to a relative or another).

When cases of "emotional distress" came before the courts in this country during the latter decades of the nineteenth century, the courts envisaged a wide range of problems incident to such cases, the full dimensions of which appeared staggering. But rather than deny all such claims, the courts formulated unsophisticated, indeed crude, mechanical tests to regulate the supposed insurmountable problems, and allowed recovery where the requirements had been satisfied. After almost 75 years of stretching and circumventing these rules to achieve some semblance of justice it has become apparent that the rules should

be discarded. Experience has shown that there are certain rather well defined types of harms and classes of situations where claims for "emotional distress" exist with some degree of consistency. It ought to be apparent that, at least in some areas, the protection of mechanical tests — and experience has shown them to be more a protection of the judiciary against the unknown than of defendants against fictitious claims — is no longer necessary; that standards can confidently be applied. It is time for those courts which still apply mechanical tests to look at "emotional distress" cases in a more sophisticated way and to determine in which classes of cases rules are necessary and in which standards are permissible.