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# Interest in Mental Tranquillity

Robert S. Amdursky
*University at Buffalo School of Law*

# THE INTEREST IN MENTAL TRANQUILLITY

ROBERT S. AMDURSKY*

SINCE its genesis, the law of torts has consistently provided remedies for previously unsecured interests and accorded greater safeguards to those given only limited protection.[1] Sometimes, scientific discoveries motivate this dynamic process by disproving the factual assumptions underlying the denial or limitation of liability.[2] More often, perhaps, progress results from changed conceptions of social values.[3]

Nowhere has this process been more graphically illustrated than in the evolution of the legal recognition of the interest in mental tranquillity. One hundred years ago, Lord Wensleydale confidently concluded that "Mental pain or anxiety the law . . . does not pretend to redress, when the unlawful act complained of causes that alone."[4] Today, according to the highest court in New York, "freedom from mental disturbance is . . . a protected interest . . . ."[5]

However, to state that the interest in mental tranquillity is legally protected does no more than pose the problem and raise a series of difficult questions. Does the law safeguard this interest against invasion caused by negligence? by outrageous acts? or by intentional conduct? If it is protected against negligent invasion, is the duty to use due care confined to certain groups or does it extend to every member of the community? Is the secured interest freedom from all mental anguish, however slight? or from severe emotional distress? or only from mental disturbance which is accompanied by physical manifestations? How, finally, is the right of recovery affected by the plaintiff's pre-existing psychic condition?

A search for answers to these questions leads one into fascinating areas of law and psychiatry. It is the purpose of this article to explore these areas and to offer some tentative conclusions. Throughout, particular emphasis will be

* Instructor in Law, State University of New York at Buffalo School of Law. A.B. 1959, Cornell University; LL.B. 1962, Harvard. Former Law Clerk to the late Justice Philip Halpern.

1. Restatement, Torts § 1, comment *e* (Supp. 1948); Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1891). See generally Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463 (1962).

2. *E.g.*, Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951) (overruling Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), and recognizing a child's right to recover for prenatal injuries sustained subsequent to viability). See also Cardozo, The Nature of the Judicial Process 80-81 (1921).

3. *E.g.*, Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957) (overruling Schloendorff v. New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914) and imposing liability on charitable hospitals for negligence of their professional employees); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (refusing to follow Winterbottom v. Wright, 10 Mees. & W. 109, 152 Eng. Rep. 402 (1842) and giving a cause of action to the ultimate purchaser against the manufacturer for its negligence).

4. Lynch v. Knight, 9 H.L. Cas. 577, 598, 11 Eng. Rep. 854, 863 (1861).

5. Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996 (1958). See also Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

In this article, the following terms will be treated as synonymous and will be used interchangeably: psychic injury, severe mental (or emotional) anxiety, anguish, distress, disturbance and suffering.

placed on the law of New York. This is not because that State is either a leader or a laggard in the field, but merely because its progress fairly represents that of other jurisdictions. It is appropriate to begin, then, by examining the degree of protection accorded the interest in mental tranquillity, as exemplified by the decisions of the courts of New York.

## Degree of Protection

The law has seldom spread the whole cloak of its protection over an interest in but one movement. Rather, it has preferred to confer its recognition and to increase the extent of it only gradually. This process has often been the object of study by legal historians. Their conclusions tend to illuminate the path which the law might follow in its treatment of such a newly emerging interest as that in mental tranquillity.

The first stage in the recognition of an interest as worthy of legal safeguards is often its treatment as an element of "parasitic" damage attached to an independent cause of action and serving to increase the amount recoverable. An element of damage is said to be "parasitic" when the law permits an injury to be considered in assessing the recoverable damages, although that injury cannot be taken into account in determining the primary question of liability.[6] Professor Street has observed that "a factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability."[7]

The law takes its next step when it treats the intentional invasion of the interest as a separate tort. According to Judge Magruder, "usually the law's first step in the independent recognition of an interest is to secure it against conduct purposely invading it."[8] The comparative willingness to grant a remedy for the intentional infringement of an interest no doubt reflects the natural tendency of the courts to extend liability as the moral guilt of the defendant increases.[9] Moreover, deliberate invasion of the interests of another is almost invariably devoid of social utility.[10]

The third stage in this evolutionary process imposes a duty to avoid unreasonable encroachments of the interest upon those engaged in a "common calling," but not upon the general public.[11] Thus, in early cases the common carrier, innkeeper, surgeon, barber and blacksmith were held liable in negligence on facts which would not state a cause of action against an ordinary stranger.[12]

6. 1 Street, Foundations of Legal Liability 461 (1906).
7. *Id.* at 470. See also McNiece, *Psychic Injury and Liability in New York*, 24 St. John's L. Rev. 1, 10 (1949).
8. Magruder, *Mental and Emotional Disturbance in the Law of Torts* 49 Harv. L. Rev. 1033, 1058 (1936).
9. See Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. Pa. L. Reg. 587 (1933).
10. See Seavy, *Principles of Torts*, 56 Harv. L. Rev. 72, 84 (1942).
11. 1 Street, Foundations of Legal Liability 184-86 (1906).
12. Holmes, The Common Law 184 (1881); Ames, *History of Assumpsit*, 2 Harv. L. Rev. 1 (1888); Arterburn, *The Origin and First Test of Public Callings*, 75 U. Pa. L. Rev.

The theory of these cases appears to be that a person pursuing a public calling holds himself out to be one in whom confidence may be reposed. Having thereby induced the plaintiff to entrust him with the plaintiff's person or property, he is deemed to have undertaken the obligation to use due care for its protection.[13] In addition, when using their services, the public is almost invariably in a position of dependence upon and under the control of those engaged in a common calling.[14] This peculiar opportunity to work injury justifies the obligation to refrain.

Finally, an interest reaches its maturity at common law when it is safeguarded from unreasonable invasions by the public generally. There is a remarkable correlation between this evolutionary pattern and the history of the interest in mental tranquillity. As one examines the development of this interest, it is relevant to recall the observation of Mr. Justice Cardozo that "history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future."[15]

Mental anguish has long been treated as a parasitic component of damages.[16] The well-established rule, as set forth in the Restatement of Torts, is that "if the actor has by his tortious conduct become liable for an invasion of any legally protected interest of another, emotional distress caused by the invasion or by the tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other."[17] So it is that in actions for bodily injuries,[18] defamation,[19] nuisance,[20] conversion,[21] malicious prose-

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411 (1927); Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. Rev. 184 (1926).

13. Prosser, Torts 116 (2d ed. 1955). See Arterburn, *supra* note 12, at 416; Winfield, *supra* note 12, at 186-89.

14. Chamberlin v. Chandler, 5 Fed. Cas. 413 (No. 2575) (C.C.D. Mass. 1823) (per Story, J.); Bleeker v. Colorado & So. R.R., 50 Colo. 140, 114 Pac. 481 (1911). See also Winfield, *supra* note 12, at 185-86.

It is also noteworthy that those engaged in a common calling can, by means of rates, prices and insurance, distribute over society as a whole the inevitable losses of a complex, industrial way of life. This faculty usually makes them better able to absorb the loss than the plaintiff and, in fact, than an individual tortfeasor.

15. The Nature of the Judicial Process 53 (1921).

16. See Ransom v. New York & Erie R.R., 15 N.Y. 415 (1857).

17. Restatement, Torts § 47(b) (1934).

18. Quinn v. Long Island R.R., 105 N.Y. 643, *affirming* 34 Hun 331 (1884); Ransom v. New York & Erie R.R., 15 N.Y. 415 (1857); Webb v. Yonkers R.R., 51 App. Div. 194, 64 N.Y. Supp. 491 (2d Dep't 1900); 25 C.J.S. *Damages* § 62, at 548 (1941); 1 Sedgwick, Measure of Damages § 47, at 75 (9th ed. 1912).

19. Garrison v. Sun Printing & Publishing Ass'n, 207 N.Y. 1, 100 N.E. 430 (1912); Clevenger v. Baker Voorhis & Co., 19 A.D.2d 340, 243 N.Y.S.2d 231 (1st Dep't 1963); Bird v. Press Publishing Co., 154 App. Div. 491, 139 N.Y. Supp. 88, *aff'd*, 214 N.Y. 645, 108 N.E. 1089 (1915); Osterheld v. Star Co., 146 App. Div. 388, 393, 131 N.Y. Supp. 247, 251 (2d Dep't 1911); Palmer v. New York News Publishing Co., 31 App. Div. 210, 52 N.Y. Supp. 539 (1st Dep't 1898); Van Ingen v. Star Co., 1 App. Div. 429, 37 N.Y. Supp. 114 (1st Dep't 1896), *aff'd*, 157 N.Y. 695, 51 N.E. 1094 (1898).

20. Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944), 45 Colum. L. Rev. 484 (1945); Salmond, Torts 231 (9th ed. 1936).

21. Cauverien v. DeMetz, 20 Misc. 2d 144, 188 N.Y.S.2d 627 (Sup. Ct. 1959).

cution and false imprisonment,[22] the measure of damages has traditionally included compensation for the plaintiff's mental suffering.

The burial right cases, which have been viewed "as a direct exception to the general rule of no liability for psychic stimuli,"[23] are nothing more than another example of this parasitic recovery. In these cases the surviving spouse or next of kin has been given a cause of action for the performance of an unauthorized autopsy,[24] for the wrongful retention of organs of the deceased after autopsy,[25] for the defendant's inability or refusal to deliver the body,[26] and for the unauthorized burial of the decedent.[27] The basis of the cause of action is the right of the surviving spouse or next of kin to the possession of the body of the decedent for the purpose of burial.[28] Damages for mental anguish are merely "tacked on" to the wrongful invasion of this well-recognized right.[29] That this is so is demonstrated by the facts that (1) standing to sue is restricted to the person whose right and duty it is to bury the deceased, even though another may have suffered equal mental anguish as the proximate consequence of the defendant's acts,[30] (2) damages have always been recoverable although the defendant's acts were negligent only[31] and (3) no pecuniary damage need

22. Jacobs v. Third Ave. R.R., 71 App. Div. 199, 75 N.Y. Supp. 679 (1st Dep't 1902); Linitzky v. Gorman, 146 N.Y. Supp. 313 (N.Y. City Ct. 1914); 1 Clark, New York Law of Damages §§ 414, 418 (1925).

23. McNiece, *supra* note 7, at 33.

24. Darcy v. Presbyterian Hosp., 202 N.Y. 259, 95 N.E.2d 695 (1911); Brown v. Broome County, 10 A.D.2d 152, 197 N.Y.S.2d 679 (3d Dep't 1960), *aff'd*, 8 N.Y.2d 330, 170 N.E.2d 666, 207 N.Y.S.2d 657 (1960); Beller v. City of New York, 269 App. Div. 642, 58 N.Y.S.2d 112 (1st Dep't 1945); Grawunder v. Beth Israel Hosp. Ass'n, 242 App. Div. 56, 272 N.Y. Supp. 171 (2d Dep't 1934), *aff'd*, 266 N.Y. 605, 195 N.E. 221 (1935); Jackson v. Savage, 109 App. Div. 556, 96 N.Y. Supp. 366 (1st Dep't 1905); Foley v. Phelps, 1 App. Div. 551, 37 N.Y. Supp. 471 (1st Dep't 1896); Torres v. State, 34 Misc. 2d 488, 228 N.Y.S.2d 1005 (Ct. Cl. 1962). See also Hasselbach v. Mount Sinai Hosp., 173 App. Div. 89, 159 N.Y. Supp. 376 (1st Dep't 1916).

25. Hassard v. Lehane, 143 App. Div. 424, 128 N.Y. Supp. 161 (1st Dep't 1911).

26. Klumbach v. Silver Mt. Cemetery Ass'n, 242 App. Div. 843, 275 N.Y. Supp. 180 (2d Dep't 1934), *aff'd*, 268 N.Y. 525, 198 N.E. 386 (1935), 21 Cornell L.Q. 166 (1935); Lubin v. Sydenham Hosp., Inc., 181 Misc. 870, 42 N.Y.S.2d 654 (Sup. Ct. 1943); Lott v. State, 32 Misc. 2d 296, 225 N.Y.S.2d 434 (Ct. Cl. 1962).

27. At sea: Finley v. Atlantic Transp. Co., 220 N.Y. 249, 115 N.E. 715 (1917). This case might alternatively be categorized as one involving the inability to deliver the body.

28. Darcy v. Presbyterian Hosp., 202 N.Y. 259, 262-63, 95 N.E.2d 695, 696 (1911); Beller v. City of New York, 269 App. Div. 642, 643, 58 N.Y.S.2d 112, 113 (1st Dep't 1945); Hassard v. Lehane, 143 App. Div. 424, 425-26, 128 N.Y. Supp. 161, 162 (1st Dep't 1911). The right to dispose of the corpse by decent sepulture includes the right to possession of the body in the same condition which death leaves it. Foley v. Phelps, 1 App. Div. 551, 555, 37 N.Y. Supp. 471, 474 (1st Dep't 1896); Deibler v. American Radiator & Standard Sanitary Corp., 196 Misc. 618, 92 N.Y.S.2d 356 (Sup. Ct. 1949).

29. Hassard v. Lehane, 143 App. Div. 424, 128 N.Y. Supp. 161 (1st Dep't 1911).

30. Gostkowski v. Roman Catholic Church, 262 N.Y. 320, 186 N.E. 798 (1933) (son held improper party to bring action where decedent was survived by spouse); Trammell v. City of New York, 193 Misc. 356, 82 N.Y.S.2d 762 (Sup. Ct. 1948), *aff'd*, 276 App. Div. 781, 93 N.Y.S.2d 299 (2d Dep't 1949) (sister held improper party to bring action where decedent was survived by spouse and mother).

31. See Finley v. Atlantic Transp. Co., 220 N.Y. 249, 258, 115 N.E. 715, 718 (1917); Beller v. City of New York, 269 App. Div. 642, 58 N.Y.S.2d 112 (1st Dep't 1945); Torres v. State, 34 Misc. 2d 488, 228 N.Y.S.2d 1005 (Ct. Cl. 1962). See also dissent in Klumbach v. Silver Mt. Cemetery Ass'n, 242 App. Div. 843, 275 N.Y. Supp. 180 (2d Dep't 1934), *aff'd*, 268 N.Y. 525, 198 N.E. 386 (1935). In those cases decided prior to Battalla v. State,

be alleged or proved.[32]

A further illustration of the breach of a distinct legal duty serving as a "peg" upon which to hang liability for mental distress is found in the so-called "slight impact" cases. The tort here is interference with the plaintiff's right to the inviolability of his person.[33] But there need be little or no relationship between the breach of duty for which the cause of action is given and the psychic injury for which the greatest portion of the damages is invariably awarded. Any accompanying physical impact, even though slight, will serve to open the door "to the full joy of complete recovery" for serious mental disturbance.[34] Thus, an electric shock,[35] several drops of lead,[36] or even a blast of air filled with splinters[37] has been held sufficient. Moreover, it is not necessary that the impact be reflected upon the surface of the body by a bruise or otherwise;[38] an internal injury will do.[39] Nor is a causal relationship between the impact and the mental anguish required; it is enough that the occurrence of the impact is proved.[40]

Lastly, psychic injury has been treated as an element of parasitic damage in actions for breach of implied warranty. Producers, manufacturers, packers, and bottlers of food and drink impliedly warrant that their product is fit for human consumption.[41] Cockroaches interred in charlotte russe[42] or in pie crust,[43]

10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), impact to the plaintiff was required.

32. Darcy v. Presbyterian Hosp., 202 N.Y. 259, 262, 95 N.E. 695, 696 (1911); Beller v. City of New York, 269 App. Div. 642, 643, 58 N.Y.S.2d 112, 113 (1st Dep't 1945). See generally 13 N.Y. Jur. *Damages* § 121, at 605 (1960); 14 N.Y. Jur. *Dead Bodies* §§ 14-17, 20 (1960); 25 C.J.S. *Dead Bodies* § 8 (1941); 15 Am. Jur. *Dead Bodies* § 27, at 847-49 (1938).

33. See Spencer, Principles of Justice, ch. 9-18 (1897); Paulsen, A System of Ethics 633 (Thilly transl. 1899).

34. Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497, 504 (1922). See Comstock v. Wilson, 257 N.Y. 231, 237, 177 N.E. 431, 433 (1931).

35. Buckbee v. Third Ave. R.R., 64 App. Div. 360, 72 N.Y. Supp. 217 (2d Dep't 1901).

36. Hack v. Dady, 142 App. Div. 510, 127 N.Y. Supp. 22 (2d Dep't 1911).

37. Sawyer v. Dougherty, 286 App. Div. 1061, 144 N.Y.S.2d 746 (3d Dep't 1955), *leave to appeal denied*, 309 N.Y. 1032 (1955). See also Lofink v. Interborough, 102 App. Div. 275, 92 N.Y. Supp. 386 (3d Dep't 1905) (impact with side of railroad car); Powell v. Hudson Valley R.R., 88 App. Div. 133, 84 N.Y. Supp. 337 (3d Dep't 1903) (burns to shoes and bottom portion of dress); Wood v. New York Cent. & H.R.R., 83 App. Div. 604, 82 N.Y. Supp. 160 (4th Dep't 1903), *aff'd*, 179 N.Y. 557, 71 N.E. 1142 (1904) (impact with seat of buggy); Jones v. Brooklyn Heights R.R., 23 App. Div. 141, 48 N.Y. Supp. 914 (2d Dep't 1897) (impact with falling small incandescent light bulb); Tracy v. Hotel Wellington Corp., 175 N.Y. Supp. 100 (App. T. 1st Dep't 1919), *aff'd*, 188 App. Div. 923, 176 N.Y. Supp. 923 (2d Dep't 1919) (fall of four feet from rising elevator to landing).

38. Yates v. Stevenson, 246 App. Div. 839, 284 N.Y. Supp. 838 (2d Dep't 1936).

39. See Driscoll v. Gaffey, 207 Mass. 102, 92 N.E. 1010 (1910); Steverman v. Boston Elevated R.R., 205 Mass. 508, 91 N.E. 919 (1910); *Study Relating to Liability for Injuries Resulting from Fright or Shock*, 1936 Leg. Doc. No. 65 (E), 1936 Report of N.Y. Law Revision Commission 427; McNiece, *supra* note 7, at 52.

40. Comstock v. Wilson, 257 N.Y. 231, 238, 177 N.E. 431, 433 (1931); 1936 Report of N.Y. Law Revision Commission, *supra* note 39, at 424; McNiece, *supra* note 7, at 52.

41. Greco v. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938); Rinaldi v. Mohican Co., 225 N.Y. 70, 121 N.E. 471 (1918); Race v. Krumm, 222 N.Y. 410, 118 N.E. 853 (1918); 77 C.J.S. *Sales* § 331(a) (1952); 1 Williston, Sales § 242 (1948).

42. Sider v. Reid Ice Cream Co., 125 Misc. 835, 211 N.Y. Supp. 582 (App. T. 2d Dep't 1925).

43. Carrol v. New York Pie Baking Co., 215 App. Div. 240, 213 N.Y. Supp. 553 (2d Dep't 1926).

mice embalmed in Coca Cola[44] or buried in pipe tobacco,[45] and worms inhumed in a can of corn,[46] not surprisingly, have been held to constitute a breach of that warranty.[47] The damage caused by this default is invariably the mental anguish plaintiff suffers upon encountering these repulsive substances in the food or drink which he is consuming.[48]

The intentional infliction of mental suffering is generally recognized as a separate tort.[49] The applicable principle, propounded by the American Law Institute in the Restatement of Torts, is that "one who, by extreme and out-

44. Trembly v. Coca Cola Bottling Co., 285 App. Div. 539, 138 N.Y.S.2d 332 (3d Dep't 1955).

45. Foley v. Liggett & Myers Tobacco Co., 136 Misc. 468, 241 N.Y. Supp. 233 (App. T. 2d Dep't 1930).

46. Gay v. A & P Food Stores, 39 Misc. 2d 360, 240 N.Y.S.2d 809 (Civ. Ct., N.Y.C. 1963).

47. See also Mitchell v. Coca Cola Bottling Co., 11 A.D.2d 579, 200 N.Y.S.2d 478 (3d Dep't 1960); Barrington v. Hotel Astor, 184 App. Div. 317, 171 N.Y. Supp. 840 (1st Dep't 1918).

48. Two additional groups of cases generally classified as exceptions to the rule of no liability for psychic injury deserve comment here. The first group has been characterized by the New York Law Revision Commission as involving "the external operation of fright." 1936 Report of N.Y. Law Revision Commission, *supra* note 39, at 439-44. They fall into three categories. First, the plaintiff, frightened by defendant's conduct, is injured attempting to escape the impending danger. Ansteth v. Buffalo Ry., 145 N.Y. 210, 39 N.E. 708 (1895); Twomley v. C.P.N. & E.R.R.R., 69 N.Y. 158 (1877); Mahoney v. Knickerbocker Ice Co., 229 App. Div. 317, 241 N.Y. Supp. 160 (1st Dep't 1930); *cf.* Spangberg v. Eastern Airlines, 285 App. Div. 1002, 139 N.Y.S.2d 292 (4th Dep't 1955). Second, defendant's acts cause plaintiff to faint, and bodily injuries are sustained as the result of the fall. Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931); Mundy v. Levy Bros. Realty Co., 184 App. Div. 467, 170 N.Y. Supp. 994 (2d Dep't 1918); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y. Supp. 39 (1st Dep't 1914). Third, physical injuries are caused by contact with a third person or an animal which has been frightened by defendant's conduct and seeks to escape the threatened danger. Lawry v. Manhattan Ry., 99 N.Y. 158, 1 N.E. 608 (1885); Mason v. West, 61 App. Div. 40, 70 N.Y. Supp. 478 (4th Dep't 1901); Schachter v. Interborough Rapid Transit Co., 70 Misc. 558, 127 N.Y. Supp. 308 (App. T. 1911) *rev'd on other grounds*, 146 App. Div. 139, 130 N.Y. Supp. 549 (1st Dep't 1911). However, it should be noted that these cases did not in fact represent an exception to the principle that there could be no recovery for negligently caused psychic injuries. The damages awarded compensated for plaintiff's physical injuries. The emotional disturbance merely constituted a link in the chain of causation between defendant's wrongful conduct and plaintiff's physical harm. See Gonsenhauser v. New York Cent. R.R., 8 A.D.2d 483, 487, 188 N.Y.S.2d 901, 905 (4th Dep't 1959); 2 Harper & James, The Law of Torts § 18.4, at 1033 (1956); Bohlen & Polikoff, *Liability in New York for Physical Consequences of Emotional Disturbance*, 32 Colum. L. Rev. 409, 412-14 (1932); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 268-70 (1921). See also Restatement, Torts § 306 (1934).

The Workmen's Compensation cases, *e.g.*, Klimas v. Trans Caribbean Airways, 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1962); Chicklowski v. Hotel Syracuse, 5 A.D.2d 704, 168 N.Y.S.2d 641 (3d Dep't 1958); Rodriguez v. State Industrial Bd., 256 App. Div. 875, 9 N.Y.S.2d 264 (3d Dep't 1939); Pickerell v. Schumacher, 215 App. Div. 745, 212 N.Y. Supp. 899 (3d Dep't 1925), *aff'd*, 242 N.Y. 577, 152 N.E. 434 (1928), are, by their very nature, inapposite to an analysis of the development of common law liability for mental anguish. Workmen's Compensation is a statutory scheme in which liability for work-connected injuries is imposed upon the employer without regard to the traditional concepts of negligence law. 1 Larson, Workmen's Compensation Law §§ 1.10, 2.10 (1952). For analyses of the problems involved in these cases, see Report of the Special Committee of the New York State Bar Association to Study the Workmen's Compensation Law (1957); Cohen, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 Yale L.J. 1129 (1961); Manson, *Workmen's Compensation and the Disabling Neurosis*, 11 Buffalo L. Rev. 376 (1962).

49. Prosser, *Insult and Outrage*, 44 Calif. L. Rev. 40 (1956); 52 Am. Jur. *Torts* § 49 (1944); cases collected in Annot., 64 A.L.R.2d 100, 119 (1959).

rageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it."[50] This statement accurately reflects the decisional law.

Willfully caused mental anguish has consistently been held to be an actionable wrong.[51] The defendant need not actually intend to cause emotional disturbance. That he knowingly and intentionally did the act which caused the damage and that the damage was substantially certain to follow is sufficient.[52] In fact, an allegation that severe mental disturbance resulted from acts which were reckless or wanton has been held to state a cause of action.[53]

The fact that the invasion of the plaintiff's rights is intentional or reckless has been considered particularly important in the field of psychic injury. Not only does such conduct involve moral turpitude and lack social utility, it often contains an element of outrage which in itself tends to insure that the asserted mental disturbance is genuine and serious, *i.e.*, defendant's conduct is so outrageous that real and severe mental disturbance is considered a normal response to it.[54]

There is a substantial body of authority looking toward the proposition that one pursuing a public calling has a duty to avoid unreasonable interference with the mental tranquillity of those dealing with him.[55] That such an obli-

50. Restatement (Second), Torts § 46(1) (Tent. Draft No. 1, 1957).

51. Wilkinson v. Downton [1897] 2 Q.B. 57; Blakeley v. Estate of Shortal, 236 Iowa 787, 20 N.W.2d 28 (1945); State Rubbish Collectors v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961); Preiser v. Wielandt, 48 App. Div. 569, 62 N.Y. Supp. 890 (2d Dep't 1900); Williams v. Underhill, 63 App. Div. 223, 71 N.Y. Supp. 291 (1st Dep't 1901); Beck v. Libraro, 220 App. Div. 547, 221 N.Y. Supp. 737 (2d Dep't 1927); Bergman v. Rubenfeld, 66 N.Y.S.2d 895 (N.Y. City Ct. 1946); Mitran v. Williamson, 21 Misc. 2d 106, 197 N.Y.S.2d 689 (Sup. Ct. 1960); Ruiz v. Bertolotti, 37 Misc. 2d 1067, 236 N.Y.S.2d 854 (Sup. Ct. 1962), *aff'd*, 20 A.D.2d 628, 245 N.Y.S.2d 1003 (2d Dep't 1963). See also Garrison v. Sun Publishing Co., 207 N.Y. 1, 100 N.E. 430 (1912); 13 N.Y. Jur. *Damages* § 126 (1960); 12 Syracuse L. Rev. 131 (1961).

52. Mitran v. Williamson, 21 Misc. 2d 106, 109, 197 N.Y.S.2d 689, 692 (Sup. Ct. 1960); Bergman v. Rubenfeld, 66 N.Y.S.2d 895 (N.Y. City Ct. 1946); Restatement, Torts § 13, comment *d* (1934); Restatement (Second), Torts § 8A (Tent. Draft No. 1, 1957).

53. Beck v. Libraro, 220 App. Div. 547, 221 N.Y. Supp. 737 (2d Dep't 1927).

54. Prosser, *Intentional Infliction of Mental Suffering*, 37 Mich. L. Rev. 874, 878 (1939); Prosser, *Insult and Outrage*, 44 Calif. L. Rev. 40, 44-45 (1956).

55. The "public calling" cases have sometimes been analyzed as an instance of parasitic damages upon a cause of action for breach of contract. See McNiece, *supra* note 7, at 37-44; Note, 28 Brooklyn L. Rev. 177, 182 (1962); Note, 39 U. Det. L.J. 137, 138 (1961). But this would not seem to be the proper analysis. First, mental suffering resulting from a breach of contract is generally not an element of damages recoverable in an action for such breach. Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 111, 126 N.E. 647, 649 (1920); Furlan v. Rayan Photo Works, Inc., 171 Misc. 839, 12 N.Y.S.2d 921 (N.Y. Munic. Ct. 1939); 13 N.Y. Jur. *Damages* § 129, at 620 (1960); 25 C.J.S. *Damages* § 69, at 555 (1941); 15 Am. Jur. *Damages* § 182, at 599 (1938). Second, in every case in which recovery has been allowed, the defendant was in fact engaged in a common calling. Third, liability has been imposed, in other jurisdictions at least, even where there was no contract, see, *e.g.*, Texas & Pac. Ry. v. Jones, 39 S.W. 124 (Tex. Civ. App. 1897); St. Louis-San Francisco Ry. v. Clark, 104 Okla. 24, 229 Pac. 779 (1924), or where plaintiff was not a party to the contract, Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955), *cert. denied*, 350 U.S. 947 (1956); Note, 25 Fordham L. Rev. 170 (1956). This has led Dean Prosser to conclude "that the action is essentially one in tort, and that any contract is merely a side issue." *Insult and Outrage*, 44 Calif. L. Rev. 40, 60 (1956). See also Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1052 (1936).

gation exists on the part of innkeepers[56] and common carriers[57] seems established. The possessor of land who holds it open as a place of public resort for his own business purposes apparently has been placed in the same category.[58] Although the question has not been passed upon in New York since the turn of the century,[59] it is generally recognized in other jurisdictions that telegraph companies are subject to liability for negligently caused emotional disturbance.[60]

*Battalla v. State*,[61] an historic decision of the New York Court of Appeals handed down in 1961, belongs to this body of authority. That case involved a public ski area owned and operated by the State of New York. An attendant failed to lock the safety bar on a chair lift upon which plaintiff, a nine-year-old girl, was a passenger. During the descent the bar opened and she became frightened and hysterical. The claim alleged that plaintiff was negligently caused to suffer "severe emotional and neurological disturbances with residual physical manifestations." In holding that a cause of action was stated, the Court abrogated the 65-year-old rule of *Mitchell v. Rochester Railway Company*,[62] that negligently caused mental anguish was not compensable in the absence of contemporaneous physical impact.

The most recent case in this field, which seems to delimit the scope of protection afforded by *Battalla*, is *Kalina v. General Hospital*.[63] There the

56. There is "an obligation on the part of the innkeeper that neither he nor his servants will abuse or insult the guest, or indulge in any conduct or speech that may unnecessarily bring upon him physical discomfort or distress of mind." DeWolf v. Ford, 193 N.Y. 397, 404, 86 N.E. 527, 530 (1908). See also Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920); McKee v. Sheraton-Russell, Inc., 268 F.2d 669 (2d Cir. 1959); 29 Am. Jur. *Innkeepers* §§ 56, 57 (1960); Restatement (Second), Torts § 48 (Tent. Draft No. 1, 1957), § 314A (Tent. Draft No. 5, 1960).

57. Gillespie v. Brooklyn Heights R.R., 178 N.Y. 347, 356, 70 N.E. 857, 860 (1904). See also Brown v. Fifth Ave. Coach Lines, 16 Misc. 2d 692, 185 N.Y.S.2d 923 (N.Y. Munic. Ct. 1959); Restatement (Second), Torts § 48 (Tent. Draft No. 1, 1957), § 314A (Tent. Draft No. 5, 1960).

58. See Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (skiing area); Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911) (bathhouse); Smith v. Leo, 92 Hun 242, 36 N.Y. Supp. 949 (Sup. Ct. 1895) (dancing school). For cases in other jurisdictions supporting the stated proposition, see Interstate Amusement Co. v. Martin, 8 Ala. App. 481, 62 So. 404 (1913); Malczewski v. New Orleans Ry. & Light Co., 156 La. 830, 101 So. 213 (1924); Saengar Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938); Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S.W. 692 (1916); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209 (1904).

59. Curtin v. Western Union Tel. Co., 13 App. Div. 253, 42 N.Y. Supp. 1109 (1st Dep't 1897) (liability denied).

60. Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955), *cert. denied*, 350 U.S. 947 (1956); Mentzer v. Western Union Tel. Co., 93 Iowa 753, 62 N.W. 1 (1895); Cumberland Tel. & Tel. Co. v. Quigley, 120 Ky. 788, 112 S.W. 897 (1908); Barnes v. Western Union Tel. Co., 24 Nev. 438, 76 Pac. 931 (1904); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943); Western Union Tel. Co. v. Potts, 120 Tenn. 37, 224 S.W. 789 (1908); Western Union Tel. Co. v. Lane, 152 S.W.2d 780 (Tex. Civ. App. 1941). See also Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S.E. 189 (1907); Magouirk v. Western Union Tel. Co., 79 Miss. 632, 31 So. 206 (1902); Butler v. Western Union Tel. Co., 62 S.C. 222, 40 S.E. 162 (1901); Buchanan v. Western Union Tel. Co., 115 S.C. 433, 106 S.E. 159 (1920).

61. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

62. 151 N.Y. 107, 45 N.E. 354 (1896).

63. 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961), *aff'd*, 18 A.D.2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962), *aff'd*, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963); 27 Albany L. Rev. 320 (1963) (treating the case at the Appellate Division level).

complaint alleged that, after a son had been born to plaintiffs, who were Orthodox Jews, they informed the hospital that he "was to be circumcised by a Rabbi in a ritualistic ceremony in accordance with the Jewish religion . . . ." The defendant doctor, allegedly without reading a notation on the son's hospital record that he "was to be ritualistically circumcised," performed an operation resulting in circumcision. The defendant doctor was not qualified to execute that rite under Jewish religious law; nor was the prescribed religious ritual observed. It was claimed that as a result of this unauthorized operation, plaintiffs "sustained severe and intense mental pain and anguish." The Appellate Division, with Judge Halpern dissenting vigorously, affirmed the trial court's dismissal of the complaint for failure to state a cause of action. The Court of Appeals affirmed without opinion, Judges Burke and Fuld voting to reverse on the dissenting opinion below.

The *Kalina* case involved a claim of intense mental disturbance negligently caused by one engaged in a "common calling." To that extent it would appear to fall within the holding of *Battalla* and to present a legally recognized cause of action. Nevertheless, the complaint was dismissed. To reach this result, the Court may have relied on one or both of the grounds by which *Kalina* may be distinguished from the *Battalla* case.

It will first be noted that, whereas the defendant had created a foreseeable risk of bodily harm to the Battalla child, the plaintiffs in the *Kalina* case were completely outside the zone of physical peril. This raises a particularly thorny problem: should a plaintiff who was not in any danger himself but who suffered severe emotional disturbance as the result of witnessing or hearing about a negligently inflicted injury to a third person be given a cause of action? The weight of authority says No,[64] and when the question is so broadly phrased, the general rule may well be correct. As a matter of policy, a defendant who negligently injures someone should not be subject to liability to every other person who is shocked by the accident, by a view of the injuries or by a narration of the events. But where the third person is a member of the plaintiff's immediate family or is in a similarly close relationship, such as a beloved niece or nephew, fiance or lifelong friend, the matter may assume a different complexion.

In the first place, psychiatrists recognize that severe mental suffering can be a normal response to disastrous events involving those important in a person's

64. Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Amaya v. Home Ice, F. & S. Co., 29 Cal. Rptr. 33, 379 P.2d 513 (1963); Barber v. Pollock, 104 N.H. 379, 187 A.2d 788 (1963); Robbins v. Castillani, 37 Misc. 2d 1046, 239 N.Y.S.2d 53 (Sup. Ct. 1962); Berg v. Baum, 224 N.Y.S.2d 974 (Sup. Ct. 1962); Lahann v. Cravatta, 228 N.Y.S.2d 371 (Sup. Ct. 1962). See also Blessington v. Autry, 105 N.Y.S.2d 953 (Sup. Ct. 1951); Smith v. Village of Plandome, 213 N.Y.S.2d 119 (Sup. Ct. 1961); Fiorello v. New York Protestant Episcopal City Mission Society, 217 App. Div. 510, 512, 217 N.Y. Supp. 401, 404 (1st Dep't 1926) (pre-*Battalla* cases); 52 Am. Jur. *Torts* § 70 (1944); Annot., 18 A.L.R.2d 220 (1951); Lambert, [Review of Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961)], 28 NACCA L.J. 33, 56 (1962).

life.[65] "It is sufficiently obvious," states Dean Prosser, "that the shock of a mother at danger or harm to her child may be both a real and a serious injury."[66] Thus, a finding by the jury that the relationship between the plaintiff and the third person was so close that, in the particular circumstances, intense emotional disturbance was a normal reaction would tend to guarantee the genuineness of the asserted claim.

Moreover, where the plaintiff is an intimate of the victim, it is considerably more difficult to argue that recovery should be denied because the plaintiff was "unforeseeable."[67] As a matter of fact, it is not at all unlikely that such a person might be close by at the time of the accident and suffer emotional anxiety as a result of it.[68] If intense mental anguish in this plaintiff, or in the class of which plaintiff is a member, was a foreseeable consequence of defendant's conduct, then the plaintiff was within the zone of risk created by defendant's negligence and was not an "unforeseeable plaintiff."[69]

In any event, it has been suggested that if a cause of action is recognized for mental anguish suffered as the consequence of an injury to a third person, it should be subject to an important limitation. Recovery should be confined to those plaintiffs who have actually witnessed the injury first hand.[70] In many cases it will obviously be more traumatic to view the event than to encounter the results of it later. In others, such as the situation in the *Kalina* case, it may be even more shocking to be faced with the *fait accompli.* Perhaps, therefore, false or insignificant claims can be weeded out with more certainty and justice by an examination of the circumstances of each claim than by the application of a mechanical rule. Furthermore, from the standpoint of foreseeability of mental anguish, there seems little to choose between the case where a mother sees her child negligently run down by an automobile and a case where after the accident, she discovers the injured and bleeding body.[71] However, it must be conceded that this, like all arbitrary rules, offers a convenient limitation on liability.

The other ground of distinction between *Kalina* and *Battalla* is that in the former case there was no assertion of "physical manifestations" of the alleged

65. See Schwartz, *Neuroses Following Trauma*, 4 Trauma 46, 51 n.13 (1959); Guttmacher & Weihofen, Psychiatry and the Law 45 (1952); Smith, *Relation of Emotions to Injury and Disease*, 30 Va. L. Rev. 193, 253, 268 (1944).

66. Prosser, Torts 181 (2d ed. 1955).

67. See Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Amaya v. Home Ice, F. & S. Co., 29 Cal. Rptr. 33, 379 P.2d 513 (1963).

68. See Restatement (Second), Torts § 313, comment (Tent Draft No. 5, 1960).

69. 2 Harper & James, The Law of Torts 1035-36 (1956).

As far as the *Kalina* case itself is concerned, it was surely foreseeable that Orthodox Jewish parents would suffer severe mental disturbance as a result of an unauthorized circumcision of their son.

70. See Prosser, Torts 182 (2d ed. 1955); 2 Harper & James, Law of Torts § 18.4, at 1037 (1956).

71. *Cf.* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1058 (1936).

mental anguish. This difference raises the question of the nature of the interest to be protected.

THE INTEREST PROTECTED

It was inevitable that the invasion of the interest in mental tranquillity would ultimately be held to constitute legal "injury." For decades psychiatrists have recognized the serious medical consequences of intense mental anxiety. According to Freud, severe mental anguish "may exact such a price that the person suffers a very serious impoverishment in available mental energy, which consequently disables him for all important tasks of life."[72] Karen Horney relates that "intense anxiety is one of the most tormenting affects we can have. Patients who have gone through an intense bit of anxiety will tell you that they would rather die than have a recurrence of that experience."[73] In truth it has been said that acute mental "anxiety *can* actually kill."[74]

It is significant that both psychiatrists and jurists have defined "psychic injury" in terms of *severe* mental anguish. There are compelling reasons for preserving this limitation. Against the interest in mental tranquillity must be balanced the individual's right to freedom of action and the community's interest in progress. Any rule which extends undue protection to mental tranquillity will doubtless stifle initiative and thus inhibit cultural advancement. "The right to absolute peace and quiet must be foregone that the business of life may be carried on."[75]

Moreover, psychiatrists express valid concern with the developing neurotic patterns in our populace. It is generally considered that exposure to some psychic stimuli is an important factor in building up resistance to them.[76] Therefore, the desirable principle will be designed, not to pamper the psyche, but to provide a certain toughening of the mental hide.

That only severe mental distress be compensable is also required by the need for the efficient administration of justice. In order to protect the courts from being flooded with insignificant grievances, the law has always refused to concern itself with trifles. Into this category must be placed the minor disturbances which are part of the wear and tear of everyday life.

If few will dispute that recovery should be limited to severe mental anxiety, many will ask how it can be guaranteed that only genuine claims of such injury are compensated. Society does, after all, have a very real "interest against the use of the law to further imposture."[77]

72. A General Introduction to Psychoanalysis 313 (1920).
73. The Neurotic Personality in Our Time 31 (1937).
74. Smith & Hubbard, *Psychological Reactions to Traumatic Stimuli*, 1962 Ill. L.F. 190, 199.
75. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 41 Am. Law Reg. (N.S.) 141, 142 (1902).
76. Smith, *Relation of Emotions to Injury and Disease*, 30 Va. L. Rev. 193, 255 n.194 (1944). See Remarque, All Quiet on the Western Front (1929), for a graphic comparison of the psychic resistance of seasoned troops accustomed to peril of death with that of soldiers not yet conditioned by their "baptism of fire."
77. Pound, *Interests in Personality*, in Selected Essays on the Law of Torts 87, 103 (1924).

In the past, courts have relied upon the requirement that the alleged mental anguish be accompanied by physical manifestations.[78] Whether the law continues to demand these objective symptoms has not yet been decided in New York. Although it was alleged in the *Battalla* case that the plaintiff had suffered "severe emotional and neurological disturbances *with residual physical manifestations*," the Court placed no emphasis on that portion of the averment. However, the opinion does shed considerable light on how the Court might deal with the issue in the future. Judge Burke, in disposing of the argument that recognition of the Battalla claim would invite fictitious litigation, wrote:

> [T]he question of proof [of the reality of the alleged injury] in individual situations should not be the arbitrary basis upon which to bar all actions, and 'it is beside the point . . . in determining sufficiency of a pleading. . . .' [W]e must look to the quality and genuineness of the 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 dishonest claims.[79]

This approach has much to commend it.

Assurance that the asserted injury is genuine and severe can often be provided by the identification of plaintiff's symptoms as a type of neurosis following trauma. "Neurosis following trauma" is the psychiatric term for acute mental anxiety induced by a psychically stressful experience.[80] It occurs in seven well-recognized forms. The physical and psychological symptoms of each of them have been thoroughly studied and catalogued. The results of this research are so widely accepted among psychiatrists that for the past twelve years they have been incorporated in the diagnostic classification of the American Psychiatric Association.[81] The seven categories are anxiety reactions, phobic

78. Orlo v. Connecticut Co., 128 Conn. 231, 239, 21 A.2d 402, 405 (1941); Hendren v. Arkansas City, 122 Kan. 361, 252 Pac. 218 (1927); Morgan v. Hightower's Adm'r, 291 Ky. 58, 163 S.W.2d 21 (1942); Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902); Brownlee v. Pratt, 77 Ohio App. 533, 68 N.E.2d 798 (1946); Brody, *Negligently Inflicted Psychic Injuries*, 7 Vill. L. Rev. 232 (1962); Comment, 37 N.Y.U.L. Rev. 331, 334-35 (1962); Restatement (Second), Torts § 436A, comment *b* (Tent. Draft No. 7, 1962).

79. 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38 (1961).

80. Schwartz, *op.cit. supra* note 65, at 33, 52-53, 59-71.

"Neurosis," or "neurotic reactions" as they are currently called, may be defined as a severe emotional disorder characterized by disturbances of thought, feeling or behavior which vary significantly from that common to the patient's culture; there is, however, no abandonment of reality. *Id.* at 37.

"Trauma," which in legal parlance contemplates an event involving the application of external force, has a different meaning when used in a psychiatric sense. Psychic trauma is an occurrence in which one is subjected to such an amount of stress, or psychic stimulus, that he is unable to assimilate it by normal means. It requires a concentration of all his mental energy to bring the stimuli under control. As a result the individual's regular mental equilibrium is upset for an indefinite length of time. Freud, A General Introduction to Psychoanalysis 243 (1920). While an accident entailing physical impact or injury may be psychically traumatic, so may words, an incident in which fear is experienced, observed events especially those involving people important in the life of the observer, and a host of other occurrences which evoke an emotional response. Schwartz, *op. cit. supra* note 65, at 46 n.13; Guttmacher & Weihofen, Psychiatry and the Law 45 (1952).

81. American Psychiatric Ass'n, Diagnostic and Statistical Manual—Mental Disorders (1952). See also Selye, The Physiology and Pathology of Exposure to Stress (1950); Tuchler, *The Traumatic Neurosis*, 1956 J. For. Sci. 65 (1956).

reactions, conversion reactions, dissociative reactions, obsessive-compulsive reactions, depressive reactions and traumatic neurosis.[82] Through examination of the patient and the administration and evaluation of psychological tests, a competent psychiatrist can diagnose neurotic reactions with the same reliability as an orthopedic surgeon can recognize a fractured femur.[83]

Equally important are the current refined techniques for exposing malingering—the deliberate and conscious simulation of symptoms. The test performances of malingerers tend to follow an identifiable pattern and there are a variety of objective techniques for detecting simulation.[84] As one expert in legal medicine has concluded, "at one time [the danger of recovery by a malingering plaintiff] may have been a valid consideration, but today, with increased medical knowledge and methods of testing, it is most unlikely."[85]

The most persuasive reason for rejecting the physical manifestations test is that its results are anomalous. It is a matter of medical fact that all severe emotional disturbances have physical consequences. Neurological, enzymatic and hormonal changes occur in the body which are clinically measurable.[86] In many instances, however, these bodily reactions are not manifested by visible symptoms. For example, although phobic and dissociative reactions are considered as injurious and debilitating as the other categories of neurosis following trauma, they are seldom characterized by physical manifestations. It follows that if the right to maintain the action turns on the presence or absence of physical manifestations, a good many meritorious claims will be defeated.

One might conclude, therefore, that severe mental anxiety should be treated like any other injury. The Finder of Fact should be allowed to determine the reality and severity of the alleged damage on the basis of the expert medical proof adduced at trial.

### The Idiosyncratic Plaintiff

Many a commentator has pointed ominously to the spectre of the idiosyncratic plaintiff—that fragile fellow whose pre-traumatic personality showed a neurotic predisposition.[87] We are forwarned that a "defendant guilty of a minor indiscretion may find his whole fortune destroyed because he has been unlucky

82. It is beyond the scope of this article to give descriptions of these categories. For detailed, legally oriented discussions of these neurotic reactions, see Schwartz, *op. cit. supra* note 65, at 63-71; Guttmacher & Weihofen, *op. cit. supra note* 65; Curran, *Psychiatry in the Law*, 3 Lawyers' Medical Cyclopedia § 17.10, at 20-23 (1959).

83. Loria, *Traumatic Neurosis*, 3 Lawyers' Medical Cyclopedia § 20.11, at 156 (1959).

84. Schofield & Bachrach, *Psychological Testing*, 3 Lawyers' Medical Cyclopedia § 21.6, at 196 (1959).

85. Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and the Law,* 6 Clev.-Mar. L. Rev. 428, 435 (1957).

86. Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497 (1922); Smith, *Relation of Emotions to Injury and Disease*, 30 Va. L. Rev. 193, 213 (1944); Selye, *op. cit. supra* note 81; Wasmuth, *Medical Evaluation of Mental Pain and Suffering*, 6 Clev.-Mar. L. Rev. 7 (1957).

87. *E.g.*, Smith & Solomon, *Traumatic Neuroses in Court*, 30 Va. L. Rev. 87, 99-110 (1943); Smith, *supra* note 86, at 254-56; McNiece, *Psychic Injury and Liability in New York*, 24 St. John's L. Rev. 1, 70-72 (1949).

enough to strike an unusually vulnerable plaintiff":[88] a $5.00 touch may become a $10,000 liability.[89]

There is, of course, a tremendous variability in the capacity of individuals to withstand the psychic stimuli generated in stressful situations. This ability depends upon constitutional makeup, previous experiences, and, especially, early childhood environment and training. Psychic injury is always a product of predisposition and stress (psychic stimuli);[90] the amount of stress required to precipitate the injury being inversely proportional to the predisposition for it.[91]

The problem of the idiosyncratic plaintiff is properly dealt with by applying ordinary principles of tort law. Generally, if the defendant could not reasonably foresee injury as the result of his act, there is no negligence.[92] The standard of reasonable foresight usually "is measured by the reactions to be expected of normal persons" and not of the hypersensitive.[93] Thus, if the psychic stimuli created by defendant's act were insufficient to cause severe mental anxiety in a normally constituted person,[94] there was no foreseeable risk of harm. Consequently, no recovery would be allowed even though defendant's act caused severe mental anxiety in an idiosyncratic plaintiff. Defendant did not violate his duty of care.

A contrary result might obtain, however, if defendant knew, or should have known, of plaintiff's unusual psychic vulnerability. Under those circumstances, acute mental disturbance might have been an intended or reasonably foreseeable consequence.

When an idiosyncratic plaintiff is subjected to conduct involving an unreasonable risk of psychic injury to the *average* person, a different issue is raised. If the plaintiff is a member of the class so threatened, defendant was negligent as to him. But the plaintiff, being particularly susceptible to psychic stimuli, may suffer greater injury and have a poorer prognosis than would a person possessed of normal resistance.[95] May defendant limit his liability by showing the lesser extent to which a stable person would have been affected by his negligent conduct?

The general rule as to physical injuries is that a defendant who is negligent must take his victim as he finds him.[96] Hence, he is held liable to the full

88. McNiece, *supra* note 87, at 70.
89. Smith & Solomon, *supra* note 87, at 99.
90. Freud, *op. cit. supra* note 80, at 316.
91. See Brill & Beebe, A Follow-up Study of War Neuroses (1955).
92. Prosser, *op. cit. supra* note 70, at 258.
93. 2 Harper & James, The Law of Torts § 18.4, at 1035 (1956). See also Hay or Bourhill v. Young [1943] A.C. 92, 110 (H.L. 1942) (Scot.) (opinion of Lord Wright); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Smith, *supra* note 86, at 259.
94. This is a subject on which psychiatrists can give a reasonably certain medical opinion. See Horney, The Neurotic Personality of Our Time 31 (1937); Schwartz, *op. cit. supra* note 65, at 71-74; Smith, *supra* note 86, at 281-82.
95. Schwartz, *op. cit. supra* note 65, at 72, 79; Smith & Solomon, *supra* note 87, at 99.
96. Owen v. Rochester-Penfield Bus Co., 304 N.Y. 457, 108 N.E.2d 606 (1952);

extent of plaintiff's damage when his negligence, operating on a latent disease or susceptibility, produces physical injuries far more serious than anticipated.[97] The rationale is that as between the innocent victim with a substantial injury and the wrongdoer who failed to take reasonable precautions against foreseeable damage, the loss should fall on the latter. If it might be said that the loss is out of all proportion to the defendant's fault, it is even less commensurate with the victim's innocence. No substantial reason appears why the result should be different when the injury complained of is severe mental anxiety.

## CONCLUSION

An inspection of the road which the law has traveled to its current lodging place suggests a not inconceivable destination for the future. In a further stage of development cases might arise in which the interest in mental tranquillity will be protected against unreasonable invasions by the public generally. At that time the "black letter law" in the Restatement of Torts might read:

UNINTENTIONALLY CAUSED MENTAL ANXIETY IS ACTIONABLE IF

A.) THE MENTAL ANXIETY IS SEVERE, AND
B.) SEVERE MENTAL ANXIETY IN THE PLAINTIFF (OR IN THE CLASS OF WHICH PLAINTIFF IS A MEMBER) WAS A REASONABLY FORESEEABLE CONSEQUENCE OF DEFENDANT'S ACT.

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Poplar v. Bourjois, Inc., 298 N.Y. 62, 67-68, 80 N.E.2d 334, 336-37 (1948); McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911); 15 Am. Jur. *Damages* §§ 80, 81 (1938); 4 Shearman & Redfield, Negligence § 853, at 1937-38 (Rev. ed. 1941).

97. Prosser, *op. cit. supra* note 70, at 260.