DePaul University
UNIVERSITY LIBRARIES

DePaul Law Review

Volume 4
Issue 2 *Spring-Summer 1955*

Article 10

Recovery for Mental Suffering Unaccompanied by Physical Injury

DePaul College of Law

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
DePaul College of Law, *Recovery for Mental Suffering Unaccompanied by Physical Injury*, 4 DePaul L. Rev. 266 (1955)
Available at: https://via.library.depaul.edu/law-review/vol4/iss2/10

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

clear; the agency to which the reports are due is clear; it would seem that it would be within their province to clarify what amounts to a clerical error. As the dissenting opinion pungently points out:

> No doubt the forgotten words in the act provide room for quibbling, and the lawyer who is looking for litigation, or whose client seeks to avoid compliance with the law, can paint a picture of uncertainty and frustrated effort to fathom the unfathomable intent of Congress. But to me it is certain that, with or without the regulations, a person honestly seeking to comply with this law would inevitably succeed without undue mental strain in determining the statute's import and without uncertainty as to his chances of remaining within the bounds of the law.[59]

It must be remembered that the machines in question are not items of everyday use and commerce. Rather, their very existence and use has been a sore spot to local law enforcing agencies. A large majority of the states have outlawed their use and have now called upon the aid of the federal government. But to prohibit an act is one thing; to enforce this prohibition is another, especially when it can be safely said that a large number of persons who are associated with these outlawed devices are extremely adept at evading the law. Registration of manufacturers and reporting of at least legal sales would enable federal officers to determine more readily where these machines are and who is illegally transporting them. As this is not beyond the power of Congress, these provisions should not be struck down as an invasion of powers reserved to the states, but should be upheld as reasonable means to enforce a legitimate end. Then perhaps a long step will have been taken toward reducing the power of those criminal elements that depend on these machines for a large part of the revenue needed to finance their illegal operations.

[59] Ibid., at 458.

RECOVERY FOR MENTAL SUFFERING UNACCOMPANIED BY PHYSICAL INJURY

INTRODUCTION

For approximately sixty years, the problem of whether or not recovery shall be accorded for mental suffering has been a perplexing one. The multiplicity of theories, exceptions, and distinctions has made the field one wherein the factual situations are all-important. At the very base of the problem is the doctrine of legal causation, which is, in itself, a cause of judicial confusion. This comment seeks to present a broad picture of the law in this area. Because of the importance of causation, it will be necessary to present many factual situations to illustrate just where the courts will find a basis to allow or refuse recovery.

The general rule is announced and followed in innumerable cases. The courts say that mental suffering caused by the negligent act of another is not compensable unaccompanied by a wrong which in itself constitutes a cause of ac-

tion.[1] The rule itself is an indication of the confusion that surrounds the field. An attempt will be made to describe the facets of the rule in four general sections: (a) the scope of the general rule; (b) the recognized exceptions to the rule; (c) the concurrent physical injury and the impact rule; and (d) the arguments advanced for and against any further broadening of an allowance for recovery.

TYPES OF MENTAL SUFFERING

Before an examination of the rules surrounding recovery, a brief enumeration and explanation of the types of mental suffering is appropriate. These types are generally divided into four classifications. They are: (a) fright or shock; (b) humiliation, indignity and insult; (c) vexation and inconvenience; and (d) worry and apprehension of future consequences.

The first type of mental suffering, fright or shock, is closer to the physiological than to the psychological. The case of *Sloane v. So. Cal. Ry. Co.*[2] calls it a paroxysm or a disturbance of the nervous system, and distinguishes it from mere mental anguish. It is stated therein:

> It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous systems. . . . Such a result must be regarded as an injury to the body rather than to the mind even though the mind be at the same time injuriously affected.[3]

An example of the type of experience labeled fright or shock by the courts is found in *Baltimore & Ohio R. Co. v. McBride*.[4] There the plaintiff was an engineer for the defendant railroad. Through the defendant's negligence, a plug blew out of the boiler of the engine, scalding the plaintiff and forcing him to jump from the cab. The plaintiff in so doing, broke his leg and was unable to get up from the adjacent track upon which he fell. Because of the cries of onlookers to stop the train, plaintiff became aware that he lay in the path of an oncoming train. Since there was a physical injury, plaintiff was allowed to recover for his fright or shock.

The Pennsylvania Supreme Court found that there was such fear or shock recognized by law where the plaintiff suffered from a nervous condition as a result of an automobile collision caused by the defendant's negligence.[5] Corroboration of the shock suffered by the plaintiff was given by a physician.

[1] Holland v. Good Bros., 318 Mass. 300, 61 N.E. 2d 544 (1945); Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N.E. 737 (1902); Spade v. Lynn & B.R. Co., 168 Mass. 285, 47 N.E. 88 (1897); Bucknam v. Great Northern Ry. Co., 76 Minn. 373, 79 N.W. 98 (1899); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896); St. Louis & S.F. Ry. Co. v. Keiffer, 48 Okla. 434, 150 Pac. 1026 (1915); Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932).

[2] 111 Cal. 668, 44 Pac. 320 (1896).

[3] Ibid., at 670 and 322.

[4] 36 F. 2d 841 (C.A. 6th, 1930).

[5] Richardson v. Wilkes-Barre Transit Corp., 172 Pa. 636, 95 A. 2d. 365 (1953).

The cases revolving around a claim of damages for humiliation, indignity and insult most often do not involve a physical injury. Where there is a recovery allowed, it is based on the recognized exception of wilful and wanton conduct of the defendant. An example of this situation is when a worker is injured through the wilful and wanton conduct of his employer and suffers humiliation and indignity because of a disfiguring scar that remains as a result of his injury.[6] This exception will be more fully developed later in the comment.

Another type of case where humiliation, indignity and insult may be the basis of recovery is the set of facts in which a husband and wife take lodging at an inn and because of suspicious circumstances such as different times of arrival or little luggage, the innkeeper believes them to be carrying on an illicit affair.[7] Though the innkeeper's suspicions are unfounded, he bursts into the room occupied by the plaintiff and her husband and accuses both man and wife of immoral conduct using vile and abusive language. In these cases, the plaintiff is usually the wife who suffers such humiliation, indignity and insult as will be recognized and compensated by the law.

Vexation and inconvenience as a basis for an award of damages for mental suffering is usually associated with a breach of special duty imposed upon the defendant by law, or where it can be easily seen from the circumstances that mental suffering in the form of vexation and inconvenience will follow a breach of contract. The latter situation occurred when a roofer put a roof on plaintiff's house and made the usual warranties as to its quality and durability.[8] The roof was, in fact, faulty and leaked. Despite the repeated demands of the plaintiff to repair the roof, the defendant roofer failed to do so. As a result, the household goods of the plaintiff became watersoaked and consequently were ruined, and because of the dampness of the house, plaintiff became ill and suffered "much vexation and inconvenience." Plaintiff was allowed to recover for such mental suffering.

In *City of Crushing v. High*,[9] the Oklahoma Supreme Court permitted recovery where a municipality placed a defective septic tank too close to the home of the plaintiff. The result of the proximity of the septic tank was that when it became defective and overflowed, it ran into a nearby stream. The stream was rendered incapable of being used for feeding purposes, and the resulting stench made the property unsuitable for a home for the plaintiff and his family. Thus, it caused the plaintiff much discomfort, vexation and inconvenience.

The element of mental suffering classified as worry and apprehension of future consequences usually occurs where the plaintiff at the time of the de-

[6] Erie Railroad Co. v. Collins, 253 U.S. 77 (1920).

[7] Emmke v. DeSilva, 293 Fed. 17 (C.A. 8th, 1923); DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908).

[8] F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932).

[9] 73 Okla. 151, 175 Pac. 229 (1918).

fendant's act is in danger of some future harm, and the act of the defendant increases the probability that such harm will occur. An example is where the plaintiff at the time of the injury by the defendant was suffering from a malignant disease.[10] The disease required a prompt surgical operation if a fatal result was to be averted, and an injury caused by the defendant so weakened the plaintiff's heart as to render the operation impracticable. When the plaintiff learned of this through her physician, her mental anxiety and distress became the basis of such worry and apprehension of future consequences as to be a proper element of damages since it was the proximate result of the injury by the defendant. The fact that the defendant was a telegraph company is an element in considering whether recovery shall be given, as will be discussed further with the other exceptions to the general rule.

In *Davis Agent v. Murray*,[11] the court ruled that a pregnant woman who sustains injuries, caused by the actions of the defendant, which are of such a nature as to reasonably produce an apprehension that she will give birth to a deformed child, may recover for her mental suffering although such deformity does not occur. If, however, the action of the defendant causes an injury to the foetus and the child is consequently born deformed, the mother may recover not only for the physical injury, but also for the worry and apprehension of future consequences caused by the injury.

THE GENERAL RULE

The general rule should be considered in the light of the factual situations under which it usually operates. It has been held that there can be no recovery of damage for mental suffering alone where: (1) the plaintiff himself is put in peril of actual physical injury and the injury does not occur, but he suffers from fright and shock;[12] (2) the plaintiff experiences mental suffering because of the physical pain of another, usually a close relative;[13] (3) where the action is based on a breach of an expressed warranty, the breach producing mental suffering;[14] (4) where a licensee or his wife sues for mental suffering due to the violent and abusive language of an occupier of land;[15] and (5) where the defendant has accused the plaintiff of some legal or moral wrong which accusation has caused mental suffering.[16]

In the field of "actual peril to the plaintiff," *Mitchell v. Rochester Ry. Co.*[17] is

[10] Halloran v. New England Telephone & Telegraph Co., 95 Vt. 273, 115 Atl. 143 (1921).

[11] 29 Ga. App. 120, 113 S.E. 827 (1922).

[12] Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896).

[13] St. Louis & S.F. Ry. Co. v. Keiffer, 48 Okla. 434, 150 Pac. 1026 (1915).

[14] Holland v. Good Bros., 318 Mass. 300, 61 N.E. 2d 544 (1945).

[15] Bucknam v. Great Northern Ry. Co., 76 Minn. 373, 79 N.W. 98 (1899).

[16] Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932).

[17] 151 N.Y. 107, 45 N.E. 354 (1896).

probably the best illustrative case. There the plaintiff was standing on a cross-walk and was about to board one of the defendant's cars. A horse-car, negligently driven by a servant of the defendant came down the street, headed straight toward the plaintiff, and when the horse-car finally came to a stop, the head of the plaintiff was between the heads of the horses. Though the plaintiff fainted from fright, suffered a miscarriage and consequent illness, she was not allowed to recover. The court said in rather strong language that since fright itself does not give a cause of action, no recovery can be had for injuries suffered from such fright, though it be a nervous disease, miscarriage, blindness, or even insanity.

The Oklahoma Supreme Court has denied recovery to a plaintiff for his mental suffering caused by witnessing the physical suffering of his brother which was elongated by the negligence of the defendant.[18] Plaintiff had rented a train to carry his brother to a certain town where he could make connections to the city for a much needed operation. Defendant negligently allowed the train to be sidetracked in order to clear the way for an oncoming freight train. The plaintiff's brother heard the whistle of the city-bound train, knew he couldn't make his connection, became despondent, and died soon after. The rule in Oklahoma was laid down that no recovery will be allowed for mental suffering which is not produced by, connected with, or the result of, physical suffering or injury to the person enduring the mental anguish.

In *Holland v. Good Bros.*[19] the court refused to hold a vendor liable when his breach of express warranty caused the plaintiff to endure mental suffering. The defendant warranted that the automobile sold to the plaintiff was safe to use. While the plaintiff was driving the car, a door opened and her mother and sister were injured. Plaintiff was not allowed to recover for her mental suffering caused by witnessing the injury.

Minnesota has decided that the wife of a licensee has no right to recovery for mental suffering when her husband is abused by an occupier of land.[20] Though the facts are not too clear, it seems that the defendant maintained a waiting room for ladies in which only their husbands could accompany them. Plaintiff and her husband were seated in this room when an agent of the defendant approached them, and using vile and abusive language, accused plaintiff's husband of not being her husband, and ordered him from the room. As a result of hearing this language used against her husband, plaintiff became ill and fainted. The nervous condition lasted two weeks, and plaintiff sought damages for her mental suffering.

The final classification of occurrences that generally give rise to a claim for damages due to mental suffering is the accusation of a legal or moral wrong.

[18] St. Louis & S.F. Ry. Co. v. Keiffer, 48 Okla. 434, 150 Pac. 1026 (1915).

[19] 318 Mass. 300, 61 N.E. 2d 544 (1945).

[20] Bucknam v. Great Northern Ry. Co., 76 Minn. 373, 79 N.W. 98 (1899).

In *Bowles v. May*,[21] the Virginia Supreme Court of Appeals declared that a plaintiff, who suffered a reoccurrence of a paralytic stroke because of the accusations of the defendant that she was spreading scandalous rumors about him, could not recover for her mental suffering. The court based its denial of an award to the plaintiff for her mental suffering upon three points: (1) there was no evidence that plaintiff had suffered any physical injury at the hands of the defendant, (2) there was no evidence of any chain of unbroken causal connection between the alleged act of the defendant and the injury to the plaintiff, and (3) there was no evidence that the plaintiff had gone beyond his privilege of expression and had acted in such a way as to be charged with causing mental suffering by his wilful and wanton acts. This last element is a universal exception to the general rule of no recovery for mental suffering.

EXCEPTIONS TO THE GENERAL RULE

The general rule of no recovery for mental suffering is subject to four types of general exceptions. They are: (1) wilful and wanton conduct;[22] (2) certain breaches of contract;[23] (3) breach of a promise to marry;[24] and (4) the telegraph cases.[25] Where a case involves any of these four elements, the courts will ordinarily allow damages for the mental suffering of the plaintiff although no physical injury has been suffered.

At first, the exception of allowing recovery for mental suffering caused by the wilful and wanton conduct of the defendant was limited to assault cases.[26] It has, however, been extended to include cases where the intended act was serious enough to permit a finding that defendant's act had created a risk of physical illness, such as a practical joke.[27] Recovery has been allowed where the defendant told the plaintiff that she had found a pot of gold, and, as a result, plaintiff was the butt of abuse and humiliation.[28] Anorher instance is where the

[21] 159 Va. 419, 166 S.E. 550 (1932).

[22] Clark v. Associated Retail Credit Men, 105 F. 2d 62 (App. D.C., 1939); Wilson v. Wilkins, 181 Ark. 137, 25 S.W. 2d 428 (1930); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Stiles v. Morse, 233 Mass. 174, 123 N.E. 615 (1919); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926); Polard v. Phelps, 56 Ga. App. 408, 193 S.E. 102 (1937); Aetna Life Ins. v. Burton, 104 Ind. App. 576, 12 N.E. 2d 360 (1938).

[23] F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903); McConnell v. United States Express Co., 179 Mich. 522, 146 N.W. 428 (1914); Central of Ga. Ry. Co. v. Knight, 3 Ala. App. 436, 57 So. 253 (1911).

[24] Thrush v. Fullhart, 230 Fed. 24 (C.A. 4th, 1915); Morgan v. Muench, 181 Iowa 719, 156 N.W. 819 (1916); Bukowski v. Kuznia, 151 Minn. 249, 186 N.W. 311 (1922); Klitzke v. Davis, 172 Wis. 425, 179 N.W. 586 (1920); Greenberg v. Ergang, 179 N.Y. Supp. 647 (N.Y. City Ct., 1919).

[25] Western Union Telegraph Co. v. Swindle, 208 Ala. 303, 94 So. 283 (1922).

[26] Clark v. Associated Retail Credit Men, 105 F. 2d 62 (App. D.C., 1939).

[27] Ibid.

[28] Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

defendant with knowledge that the plaintiff was suffering from arterial hypertension wrote letters to him, telling him that a certain bill must be paid or he would lose his credit status which was needed to carry on his dry cleaning business.[29] Recovery was allowed for the additional doctor bills and the mental suffering of the plaintiff.

In *Wilson v. Wilkins*,[30] the plaintiff was called out of his house by the defendant and then accused of stealing hogs. Defendant told plaintiff to take his family and get out of that part of the country or they would be hanged. Plaintiff moved away from his recently acquired farm because of the fear of the unjustified accusation and the threat of death. The court, in allowing recovery to the plaintiff for the mental suffering and humiliation caused by the threat and subsequent departure said:

> . . . where the personal security of a person is endangered by the wilful and wanton actions of the defendant, recovery will be allowed to a plaintiff for the mental suffering caused proximately by such intimidation, though it is unaccompanied by a physical injury.[31]

Mutilation of dead bodies through the wilful and wanton conduct of the defendant has also been allowed as a basis for awarding damages for mental suffering.[32] In this case, the agent of the defendant performed an autopsy without legal right, and mutilated the corpse to such an extent that the sight and memory thereof caused the plaintiff, who was unaware of the autopsy until afterwards, to experience mental suffering. The unauthorized autopsy was performed two days after death and while the body was embalmed. Plaintiff was the widow of the deceased.

In *Johnson v. Sampson*[33] the defendant accused the plaintiff, a fifteen-year-old school girl, of having illicit relations with men, and threatened her with reform school if she didn't admit her promiscuous activity. The charges made against the plaintiff were wholly false. The plaintiff was allowed to recover for the wrongful charges made against her. The right of action was based on a statute which makes it a misdemeanor to accuse a girl of twelve years or over of unchastity in the hearing of another person.[34] The court said that damages for mental suffering will be allowed for violation of the statute, although there was no accompanying physical injury.

Another type of case where damages are awarded for mental suffering caused by the wilful and wanton conduct of the defendant is where the defendant placed a sign in the window of a commercial garage in a central part of the city

[29] Clark v. Associated Retail Credit Men, 105 F. 2d 62 (App. D.C., 1939).

[30] 181 Ark. 137, 25 S.W. 2d 428 (1930).

[31] Ibid., at 139 and 430.

[32] Aetna Life Ins. v. Burton, 104 Ind. App. 576, 12 N.E. 2d 360 (1938).

[33] 167 Minn. 203, 208 N.W. 814 (1926).

[34] G.S. § 10120 (1923).

which announced that the plaintiff owed the defendant an overdue bill.[35] The sign was 5 by 8 feet. Though the charge was true, the plaintiff was allowed to recover for an invasion of privacy, and was awarded damages for his mental anguish because of the defendant's wilful and wanton act. Malicious prosecution has also been the basis for an award of damages for mental suffering because of wilful and wanton conduct.[36] Plaintiff therein was unlawfully removed from his position as city treasurer without any information of the charges against him, nor any recourse to civil service.

When a trespasser is completely disregarded and no attempt is made to prevent further harm to him, an occupier of land is liable for damages due to mental suffering where his wilful and wanton conduct caused further mutilation of the body of the trespasser.[37] In this case, the plaintiff's widow was allowed to recover for the wilful and wanton conduct of the defendant railroad. In spite of the fact that blood and shreds of clothing were found on defendant's engine, defendant failed to investigate and as a result, two later trains also ran over the body of the deceased. The case was reversed because of insufficient evidence of the recklessness of the defendant.

Thus it is seen that recovery will be allowed for mental suffering because of mutilation of dead bodies,[38] invasions of privacy,[39] and malicious prosecution,[40] where the court finds that the actions of the defendant are wilful and wanton.

When mental suffering forms the basis of an award for damages in an action for breach of contract, such award is given because the circumstances are such that it can easily be seen that a breach of the contract would cause mental suffering.[41] The court, in one case, decided that where the contractual duty or obligation is so coupled with matters of mental concern or solitude, or with the feelings of the party to whom the duties are owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering.[42] Circumstances wherein the substance of the contract itself is grounds for belief that a breach will cause mental suffering arise where a carrier fails to deliver a steamer trunk to a ship in time for the departure and the plaintiff is forced to stay in her cabin for most of the transoceanic trip,[43] or where the defendant fails to reserve

[35] Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[36] Stiles v. Morse, 233 Mass. 174, 123 N.E. 615 (1919).

[37] Pollard v. Phelps, 56 Ga. App. 408, 193 S.E. 102 (1937).

[38] Aetna Life Ins. v. Burton, 104 Ind. App. 576, 12 N.E. 2d 360 (1938).

[39] Brent v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[40] Stiles v. Morse, 233 Mass. 174, 123 N.E. 615 (1919).

[41] F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903); McConnell v. United States Express Co., 179 Mich. 522, 146 N.W. 428 (1914); Central of Ga. Ry. Co. v. Knight, 3 Ala. App. 436, 57 So. 253 (1911).

[42] F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932).

[43] McConnell v. United States Express Co., 179 Mich. 522, 146 N.W. 428 (1914).

a stateroom for the plaintiff who was on her honeymoon,[44] or where the defendant failed to deliver wedding dresses in time for the wedding.[45]

In an action for breach of a promise to marry, though the action is in form a contract action, damages applicable to a tort action are awarded.[46] The damages allowed include an award for the mental suffering of the plaintiff.[47] When the element of seduction is involved, there is additional reason for compensating the plaintiff for her mental anguish.[48] Sometimes in an action for breach of promise the award is made not specifically for mental suffering, but for synonymous damages.[49]

The liability of a telegraph company for the negligent failure to transmit a message promptly extends to an award for mental suffering.[50] The Alabama Supreme Court said that the telegraph company will be liable for mental suffering if from the content of the message or otherwise they could reasonably believe at the time the contract was made, that the failure to transmit the message promptly would result in mental distress to the parties.

THE IMPACT AND CONCURRENT INJURY THEORIES

The extreme hardship and injustice of not allowing recovery for mental suffering has lead the courts to adopt three theories under which an award may be made.

The first and most widely followed theory under which there may be a recovery for mental suffering though unaccompanied by physical injury is the "impact" theory. Many courts say that if there is an impact, and afterwards the plaintiff has mental suffering, he may recover for such mental suffering though he is not physically injured.[51]

[44] Central of Ga. Ry. Co. v. Knight, 3 Ala. App. 436, 57 So. 253 (1911).

[45] Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903).

[46] Bukowski v. Kuznia, 151 Minn. 249, 186 N.W. 311 (1922).

[47] Thursh v. Fullhart, 230 Fed. 24 (C.A. 4th, 1915); Morgan v. Muench, 181 Iowa 719, 156 N.W. 819 (1916); Bukowski v. Kuznia, 151 Minn. 249, 186 N.W. 311 (1922); Klitzke v. Davis, 172 Wis. 425, 179 N.W. 586 (1920); Greenberg v. Ergang, 179 N.Y. Supp. 647 (N.Y. City Ct., 1919).

[48] Klitzke v. Davis, 172 Wis. 425, 179 N.W. 586 (1920).

[49] Thrush v. Fullhart, 230 Fed. 24 (C.A. 4th, 1915). The court of appeals here awarded the plaintiff damages for her injured feelings, anxiety of mind, wounded pride and mortification, which are the equivalent to the elements of apprehension of future consequences, mental anguish, humiliation, indignity and insult.

[50] Western Union Telegraph Co. v. Swindle, 208 Ala. 303, 94 So. 283 (1922). Here, the defendant telegraph company delayed a message to the plaintiff that his father was dead nine hours. By the time the plaintiff learned of his father's death and arrived at the place where the message was sent, a distance of thirty miles, the body had begun to deteriorate and the father had to be buried during a rainstorm at night.

[51] Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N.E. 737 (1902); Porter v. Delaware L. & W.R. Co., 73 N.J.L. 405, 63 Atl. 860 (S. Ct., 1906); Comstock v. Wilson 257 N.Y. 231, 177 N.E. 431 (1931); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928); Smith v. Montclair Brown & White Cab Co., 6 N.J. Misc. 57, 139 Atl. 904 (S. Ct., 1928); Clark Restaurant v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931).

Recovery has been allowed where the impact consisted of getting dust in the eye while walking out of a viaduct when the viaduct collapsed.[52] The shaking-up of the plaintiff in an automobile has supplied the necessary impact as to allow recovery for mental suffering.[53] Also, where plaintiff eats food which includes ground glass in the defendant's restaurant, he may recover for his mental anxiety; the impact being the scratching and cutting of the plaintiff's stomach.[54] In *Homans v. Boston Elevated Ry. Co.*,[55] damages were allowed for the shock resulting from a jar to the nervous system of the plaintiff which accompanied a slight jolt to her person. The New York Court of Appeals was confronted with a case where the plaintiff's testatrix was a guest in plaintiff's car at the time when the defendant negligently collided with them.[56] Testatrix got out of the car to get the usual drivers license and identification from the defendant. While doing so, she fainted, fell to the sidewalk, and fractured her skull. The court held that if the wrongdoer is liable for the original injury, he is liable for any consequent injury whether the damage is physical or mental, and where there has been even a slight physical impact accompanied by shock, there may be a recovery for damages to health caused by the shock, even though that shock was produced by the impact and fright concurrently. The point at which this theory descends from a very strained excuse for allowing recovery for mental suffering to an absurdity is marked by a case involving, appropriately enough, a circus.[57] Here, the plaintiff was allowed to recover for mental suffering and embarrassment where the only physical injury or impact was the defecation by the defendant's horse into the lap of the plaintiff. The impact theory is the more widely accepted theory but the concurrent injury theory is followed in a few states and merely requires an injury which need not be caused by any impact from the defendant.

The concurrent injury theory has been used as a device whereby a slight

[52] Porter v. Delaware L. &W.R. Co., 73 N.J.L. 405, 63 Atl. 860 (S. Ct., 1906). But the court did rule that defendant should be granted his motion for a new trial unless the plaintiff agreed to a reduction of excessive damages.

[53] Smith v. Montclair Brown & White Cab Co., 6 N.J. Misc. 57, 139 Atl. 904 (S. Ct., 1928).

[54] Clark Restaurant v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931). The court said the award given would have been excessive for the introduction into the plaintiff's system of the particles of glass through the defendant's negligence unless the injury was accompanied by mental anxiety.

[55] 180 Mass. 456, 62 N.E. 737 (1902).

[56] Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931).

[57] Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928). The reasoning of the court is interesting in that it allowed the recovery for mental suffering, humiliation and embarrassment resulting from a physical injury of which they are inseparable components and said that any unlawful touching of a person's body, although no actual physical hurt may ensue therefrom, constitutes a physical injury to that person since it violates a personal right. It was further explained that the unlawful touching need not be direct, but may be indirect, as by the "precipitation" of any material substance upon the body of a person. The language seems strained indeed.

physical injury has been used as the hook upon which an award for mental suffering could be hung.[58] It has been held that where a defendant had failed to provide fire escapes, and because of this a child was forced to remain in an apartment building for fifteen to twenty minutes after a fire had begun, the child is entitled to recover for mental suffering.[59] During the time the child was waiting, he inhaled a quantity of smoke and for some weeks thereafter was in a nervous condition. As a result he suffered from convulsions for a year and a half. The court held that these facts were sufficient to support a reasonable inference that the nervousness was caused by inhalation of the smoke and the plaintiff was entitled to recover for mental suffering.

The case of *Block v. Pascucci*,[60] which follows the concurrent injury theory, affords a good contrast to *Mitchell v. Rochester Ry. Co.*,[61] which is often cited for the general rule. In the *Block* case, the plaintiff was standing in a store. The defendant negligently left his car running and it rolled and crashed through the store window. The plaintiff fainted, fell to the floor, and suffered injury to the back and neck. This was considered as sufficient physical injury upon which the claim of mental suffering could be attached. In the *Mitchell* case, the defendant's horses came so close to the plaintiff before stopping, that her head was between those of the horses. There, also, plaintiff fainted, suffering a miscarriage and consequent injury. However she was not allowed to recover any damages for mental suffering. It can be seen that here the rule proves effective. Certainly both plaintiffs deserve recovery if there is to be recovery for mental suffering at all. It has served its purpose in the *Block* case of supplying a hook. The only real reasons for denying recovery for mental suffering are the difficulty of proving causation and the consequent ease of faking such injury which, the courts fear, would lead to an influx of invalid claims and thus overcrowd the courts. By the impact and concurrent injury theories the courts have attempted, with a certain degree of success, to establish a formula which would minimize the chances of these false claims. The defects of these theories, however, are apparent from the slight contacts that the court's have called impact and injury. The theories have in those cases descended from rules upon which to allow recovery, to mere excuses for awarding damages.

Mention should be made that Massachusetts awards damages for mental suffering where there is no physical injury if there is a physical impact to the plaintiff "from without" due to the defendant's negligence though the injury is very slight.[62]

[58] Block v. Pascucci, 111 Conn. 58, 149 Atl. 210 (1930); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).

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

[60] 111 Conn. 58, 149 Atl. 210 (1930).

[61] 151 N.Y. 107, 45 N.E. 354 (1896).

[62] Driscoll v. Gaffey, 207 Mass. 102, 92 N.E. 1010 (1910). In this case, the defendant was blasting about six hundred feet from plaintiff's house. From one of the explosions, a large

ARGUMENTS FOR AND AGAINST A BROADENING OF THE RULE

There are four main propositions advanced against any extension of recovery for mental suffering. First, there is no adequate standard upon which to base an award for mental suffering and thus the damages would be merely speculative.[63] It is said where this argument is given that the damages are sentimental rather than substantive,[64] that the damage depends largely upon temperament,[65] and that a jury should not be allowed to speculate on the effects of mental suffering.[66] Also it is contended that a broadening of the rule would result in a flood of litigation.[67] This argument is based upon the experience of the courts in personal injury suits and is stated very forcefully by the Pennsylvania court:

> In the last half century, the ingenuity of counsel, stimulated by the cupidity of clients and encouraged by the prejudices of juries, has expanded the action for negligence until it overlaps all others in frequency and importance; but it is only in the very end of that period that it has been stretched to the effect to cover so intangible, so untrustworthy, so illusory and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of exaggeration and even of actual fraud, in the ordinary action for physical injuries from negligence; and if we opened the door to this new invention, the result would be great danger, if not disaster to the cause of practical justice.[68]

As stated by the court above, the third argument is the danger of fraud because of the ease in faking mental suffering and the difficulty of detecting such fraud.[69] Finally public policy prohibits an allowance for recovery for mental suffering unaccompanied by physical injury.[70] These are formidable arguments, but they have been challenged by many courts and scholars.

Those who argue that mental suffering should be allowed in the absence of an accompanying physical injury contend that the only basis for denial is impracticability,[71] and that this should not deter the courts where it would result

---

stone flew into plaintiff's kitchen; she was thrown to the floor and struck her head on a closet door. There were no bruises on plaintiff's body and no complaint for physical injury. Plaintiff's doctor testified that plaintiff was suffering from neurasthenia, a neurotic condition characterized by worry and disturbances of digestion and circulation.

[63] Perry v. Capital Traction Co., 32 F. 2d 938 (App. D.C., 1929); Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N.W. 1078 (1894); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896).

[64] Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N.W. 1078 (1894).

[65] Ibid.

[66] Perry v. Capitol Traction Co., 32 F. 2d 938 (App. D.C., 1929).

[67] Perry v. Capitol Traction Co. 32 F. 2d 938 (App. D.C., 1929); Spade v. Lynn & B.R. Co., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry. Co. 151 N.Y. 107, 45 N.E. 354 (1896); Huston v. Borough of Freemansburg 212 Pa. 548, 61 Atl. 1022 (1905).

[68] Huston v. Borough of Freemansburg, 212 Pa. 548, 550, 61 Atl. 1022, 1023 (1905).

[69] Perry v. Capitol Traction Co., 35 F. 2d 938 (App. D.C., 1929); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896).

[70] Miller v. Baltimore & O. S. W. R. Co., 78 Ohio St. 309, 85 N.E. 499 (1908).

[71] Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N.E. 737 (1902).

in injustice.[72] Also, since there is no pecuniary standard in the cases involving wilful and wanton conduct, it is illogical to use this factor as a bar to recovery for damages when the conduct of the defendant is negligent.[73]

The Supreme Court of New Hampshire has said that although it is true that fright itself may be an issue that is not easy to challenge and meet, still this fact does not seem to be of sufficient reason to lay down a rule that shuts out recovery for its consequences in all cases.[74] Further they state that testimony is received cautiously when it is hard to disprove, and if it is to be conceded that our procedural system for the ascertainment of truth is inadequate to defeat fraudulent claims in such cases, then the result is a virtual acknowledgment that the courts are unable to render justice in respect to them. Justice fails because it cannot be administered with reasonable certainty. The acceptance of such a premise, in the opinion of that court, is to be allowed only if it seems clear and free from doubt, and is not to be taken for granted.

Dean Prosser has stated that it is more or less conceded that the only valid objection against recovery for mental suffering is the danger of vexatious suits and fictitious claims, which he admits, have loomed very large in the opinions as an obstacle.[75] He realizes that this danger is a real one to be met, and that mental disturbance is easily simulated and courts which are plagued with fraudulent personal injury claims may well be unwilling to open the doors to an even more dubious field. He contends, however, that the difficulty is not insurmountable and that not only fright and shock but other kinds of mental suffering are marked by definite physical symptoms which are capable of clear medical proofs. He states further, that it is entirely possible to allow recovery only upon satisfactory evidence, but to deny it when there is nothing to corroborate the claim or guarantee genuineness in the circumstances of the case. The problem, as he sees it, is one of adequate proof and it is not necessary to deny a remedy in all cases because some claims may be false.

Having thus considered the general rule, its exceptions, and the arguments that are extended for and against a broadening of the rule to allow recovery in cases where recovery is now barred, we proceed to a conclusion.

CONCLUSION

Certainly it can be said that in the field of mental suffering there is a need of revision in the law. The original rule of allowing recovery for mental suffering only where there was wilful and wanton conduct in an assault proved to be too narrow. The extension to allow recovery for mental suffering in any tort case where there is wilful and wanton conduct shows that the courts were

[72] Hanford v. Omaha & C.B. St. Ry. Co., 113 Nebr. 423, 203 N.W. 643 (1925); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930).

[73] Brent v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[74] Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930).

[75] Prosser, Torts, § 56 (1941).

becoming aware that this element of damage was assuming a more important position on the legal scene. Then the courts began awarding damages for mental suffering where it could be easily seen that a breach of contract would cause such damage. Finally, the necessity for wilful and wanton conduct was done away with by the impact and concurrent injury rules. It was thought that these were the solutions. However, it is now apparent that there are definite flaws in these theories. Of course, these developments did not appear in the neat chronological pattern as set forth. They have come to be, as Mr. Justice Holmes contended all law should be made, by the gradual accumulation of decisions on each side of the case.

But we are not yet at the solution. Surely, the decision of whether recovery should be given when there is apparent mental suffering, should not depend upon the chance occurrence of getting dust in the eye as has happened under the impact theory,[76] or the element of inhaling smoke which has been a basis of recovery under the concurrent injury theory.[77] Nor should recovery be granted for the humiliation of being a victim of a practical joke because the defendant's actions were deemed wilful and wanton[78] and be denied where the plaintiff is forced to watch his brother die because the conduct of the defendant can only be considered negligent.[79]

There would seem to be no good reason to deny recovery for mental suffering, where it would be allowed if the injury were physical. The general rule barring an action for mental injury, with its numerous exceptions, serves to place the recovery on a fictional basis without regard to the justice of the cause. The difficulty of proving the actual amount of damage should not bar the cause of action.

[76] Porter v. Delaware L. &W.R. Co., 73 N.J.L. 405, 63 Atl. 860 (S. Ct., 1906).

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

[78] Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

[79] St. Louis & S.F. Ry. Co. v. Keiffer, 48 Okla. 434, 150 Pac. 1026 (1915).

USE OF MANDAMUS TO EXPUNGE DISCRETIONARY ORDER OF FEDERAL DISTRICT COURT JUDGE

A problem has recently arisen in the federal courts that has lain dormant for a number of years. This problem concerns the power of an appellate court to issue a writ of mandamus on a matter which is purely discretionary and unappealable before final judgment, and by so doing overrule a district court judge's exercise of discretion. The power to issue a writ of mandamus comes from the All Writs Act of the United States Code[1] which allows writs to be issued at the discretion of the court. This power, however, has in some instances been used to overrule the discretion of a lower court judge, forcing

[1] 63 Stat. 102 (1949), 28 U.S.C.A. § 1651(a) (1950).