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## *Damages for Emotional Distress in Ohio*

*James G. Young\**

**W**HERE ONE PERSON through his words and actions causes emotional distress, humiliation or mental anguish to another, should there be recovery by the latter for his suffering? Let us glance at some typical cases.

Mrs. Samms was very upset. For a period of seven months a man had called her at all hours, including the middle of the night, to solicit her to enter into illicit sexual relations. He even made a visit to her home for the same purpose and also indecently exposed himself. She brought suit against this man for causing the infliction of severe emotional distress. The Supreme Court of Utah said that this stated a cause of action.<sup>1</sup>

Mrs. Lyons was at work at her job as a practical nurse. Early in the evening she received a call from a jewelry store in a nearby city advising that her 23 year old son owed the store some money. After telling her caller that she knew nothing about the matter and hadn't seen her son for some weeks, Mrs. Lyons was subjected to abusive and reviling language delivered in an extremely loud tone. Her employer found her afterward in a state of shock and hysteria. She was confined to bed with headaches and extreme nervousness. The Supreme Court of Mississippi said that this stated a cause of action.<sup>2</sup>

Mrs. Bartow, seven months pregnant, met Mr. Smith in downtown Norwalk. The Bartows and Smiths had been quarreling for some weeks over the sale of a farm, but Mrs. Bartow certainly was unprepared for the verbal punishment she was about to receive. Mr. Smith began to shout names at Mrs. Bartow that were anything but complimentary, and a crowd gathered. As she attempted to leave the scene and avoid further trouble, Mr. Smith got madder and louder. As a result of the episode Mrs. Bartow became highly nervous and cried for extended periods. She had to make several visits to her family physician. The

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<sup>1</sup> *Samms v. Eccles*, 11 Utah 2d 289, 358 P. 2d 344 (1961). A discussion of the effect of this case in Utah is made in Note, *Intentional Infliction of Emotional Distress Recognized as a Tort in Utah*, 7 Utah L. Rev. 412 (1961).

<sup>2</sup> *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963).

Supreme Court of Ohio said that this did *not* state a cause of action.<sup>3</sup>

Certainly the facts in the three cases differ, but the common factor in each is an act, intentionally done, that causes mental suffering of the plaintiff. In Utah and Mississippi this is actionable, whereas in Ohio it is not. The question that logically seems to follow then is why wasn't Mrs. Bartow able to recover damages for her anguish?

The Ohio court reasoned that even though Mr. Smith was guilty of conduct unbecoming a gentleman, this conduct did not amount to assault, and, since it happened on a sidewalk in the central retail district, it did not violate the quiet of the home. There was no slander. Furthermore, Mrs. Bartow did not claim she was put in fear or terror, and there were no threats or menacing actions by the defendant. The court said that damages were remote and speculative.

The *Bartow* case was not without precedent.<sup>4</sup> A review of

<sup>3</sup> *Bartow v. Smith*, 149 Ohio St. 301, 78 N. E. 2d 735 (1948).

<sup>4</sup> *Huffman v. T. & O. C. Ry. Co.*, 7 Ohio N. P. 67, 9 Ohio Dec. 748 (1900). As plaintiff approached an unguarded railroad crossing, defendant's train suddenly appeared without sounding its whistle or bell. Plaintiff claimed that the shock from the close call so impaired her nervous system that she was unable to work. The court refused recovery as there was no *physical injury* resulting from her fright and shock.

*Miller v. B. & O. Southwestern Ry. Co.*, 78 Ohio St. 309, 85 N. E. 499 (1908). A derailed train ran into plaintiff's house, making it uninhabitable for six months. Plaintiff was so upset that she couldn't work for three months and had to consult a physician. No recovery—the fright was not accompanied by a *contemporaneous physical injury*.

*Mancuso v. Cleveland Ry. Co.*, 23 Ohio App. 493, 155 N. E. 243 (1926). The passengers on a trolley became frightened and panic resulted when it appeared that the car might collide with a locomotive. The plaintiff, who was pregnant, remained calm, but was so jostled that a miscarriage resulted. Once again the court found that mere fright or shock, *unaccompanied by physical injury*, would not lead to recovery.

*East Ohio Gas Co. v. Van Orman*, 41 Ohio App. 56, 179 N. E. 147 (1931). Plaintiff in error's claim that there must be *contemporaneous physical injury* accompanying fright and shock was upheld.

*King v. Shelby*, 40 Ohio App. 195, 178 N. E. 22 (1931). The body of the plaintiff's mother was moved to another cemetery location. Although the court sympathized with his feelings, it said that plaintiff could not recover for mental suffering unless it was *accompanied by a physical injury*, unless testimony had shown there was a wilful, wanton or malicious act intentionally done.

*Koontz v. Keller*, 52 Ohio App. 265, 3 N. E. 2d 694 (1936). Defendant's decedent came to plaintiff's home where he killed plaintiff's sister, badly disfiguring the body in the process. Shortly after, plaintiff discovered the body and experienced great terror and shock. As a result of this her nervous system gave way and she suffered great mental and physical pain. Once again, recovery denied on the same basis.

(Continued on next page)

Ohio cases reveals that Ohio law declares there cannot be recovery for mental distress unless it is accompanied by *contemporaneous* physical injury (*i.e.*, *contact*), or unless the act was wilful, wanton or intentional.<sup>5</sup> No Ohio cases were found where recovery for purely mental suffering, caused negligently, in and of itself was permitted. This issue was squarely met in *Bartow*. The plaintiff claimed explicitly that the defendant's wilful and malicious act caused her emotional and physical suffering. The trial court gave judgment for the defendant on the opening statement. The Supreme Court, in upholding this, said:

However, in the present case, construing as we must the allegations of the plaintiff's petition and the opening statement of her counsel most strongly in her favor, the action of the defendant in using the vile epithets, which it is alleged he did, was wilful and malicious, and the question we must solve is was his conduct actionable.<sup>6</sup>

Despite its lip service to the contrary, it would appear that Ohio will not allow recovery for the infliction *per se* of mental suffering. This conclusion has been drawn by Dean Prosser, who remarked that Ohio seemed to be the only state that does not recognize that a separate tort exists apart from the traditional grounds for recovery.<sup>7</sup>

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(Continued from preceding page)

*Davis v. Cleveland Ry. Co.*, 135 Ohio St. 401, 21 N. E. 2d 169 (1939). Plaintiff developed hysteria after being momentarily trapped in the door of defendant's bus. The door did not harm her physically, but the hysteria caused a partial paralysis. Recovery not allowed for mere fright *unaccompanied* by physical injury.

*Hilliard v. Western & Southern Life Ins. Co.*, 68 Ohio App. 426, 34 N. E. 2d 75 (1941). An agent of the defendant company informed Mrs. Hilliard that she had an incurable case of cancer of the liver. As a result she died of the shock. Held: The agent's conduct was proper, he was only attempting to recover a policy. Once again the court held that there could be no liability for acts causing fright or shock when unaccompanied by *contemporaneous* physical injury.

<sup>5</sup> 16 Ohio Jur. 2d, Damages § 81 (1955); *Miller v. B. & O. Southwestern Ry. Co.*, *Ibid.* (Dicta in this case develops the argument for recovery if the act was intentional, wanton or wilful). See also, *Barnett v. Sun Oil Co.*, 113 Ohio App. 449, 172 N. E. 2d 734 (1961); *Parmalee v. Ackerman*, 252 F. 2d 721 (6th Cir. 1958).

<sup>6</sup> *Bartow v. Smith*, *supra* n. 3, at 306.

<sup>7</sup> Prosser, *Insult and Outrage*, 44 Calif. L. Rev. 40 (1956). An interesting review of areas of progress in the years that followed his earlier article, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939). What is regarded as the classic work in this area is: Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936).

In *Bartow* and the other Ohio cases the emphasis by the courts was placed on the absence of *contemporaneous* (contact) physical injury. This seems to be placing the cart before the horse. As Judge Hart pointed out in *Bartow*:

We have no concern here as to whether a plaintiff may recover for nervous shock or emotional disturbance alone where no physical injury follows. That is beside the point in this case. Here, we have a nervous shock and emotional disturbance resulting in a physical injury.<sup>8</sup>

Yet the recognition that there can be severe physical manifestations of emotional stress and that as a result the injured party may seek redress in the courts of Ohio with reasonable expectation of recovery may not go far enough. It appears there is now movement towards recovery for emotional distress *alone*, without the previously required side evidence.<sup>9</sup>

There seems to be a fear that if the courts were to allow an action for emotional distress it would open the door to all sorts of actions by neurotics, malcontents, people who have imagined insults, and so on. While there may be some validity to this argument, certainly the means are available for determining quickly the legitimacy of a complaint.<sup>10</sup> The fields of psychiatry and psychology have made tremendous strides in the past twenty or thirty years, and it would seem logical that the court could enlist the support of people well qualified in their respective fields to help in the determination of whether or not the plaintiff has the evidentiary basis for a legitimate complaint.

Elements and standards can be adopted by the courts so as to form ground rules. The Restatement<sup>11</sup> could be a starting

<sup>8</sup> *Bartow v. Smith*, *supra* n. 3.

<sup>9</sup> For instance, the latest draft of the Restatement gives full recognition to the development. Restatement (Second), Torts § 46 (1965). Outrageous Conduct Causing Severe Emotional Distress.

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

<sup>10</sup> A line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbance inflicted by intentional actions wholly lacking in social utility. *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N. E. 2d 157, 164 (1961). In this case Illinois was faced with the problem of recognizing a new tort or denying recovery. Discussed in: Note, Intentional Infliction of Mental Suffering—A New Tort in Illinois, 11 DePaul L. Rev. 151 (1961).

<sup>11</sup> *Knierim v. Izzo*, *Ibid.*

place. A recent case<sup>12</sup> suggests four standards that might be used:

1. The plaintiff must show that defendant's conduct was intentional.
2. In addition to being intentional, defendant's conduct must be extreme and outrageous.
3. The plaintiff must demonstrate that defendant's conduct was a cause-in-fact of his injury.
4. The plaintiff must demonstrate that he suffered an extreme disabling emotional response to defendant's conduct.<sup>13</sup>

Elements have been suggested:

1. *Intentional* infliction of *extreme mental suffering*.
2. The circumstances must exceed the bounds of decency and be regarded as atrocious and intolerable.<sup>14</sup>

These elements can be applied to *Bartow v. Smith*.<sup>15</sup> Mr. Smith approached Mrs. Bartow, who was minding her own business, and *intentionally* began haranguing her. The result: crying spells that continued for several weeks and necessitated a physician's care. This emotional distress was a *direct* result of the incident. Further, at the time Mrs. Smith was seven months pregnant, a fact which was readily apparent to all, with the defendant's knowledge of her pregnancy dating from the earlier associations. In that condition she was even more susceptible emotionally to the onslaught by the defendant. The court makes much of the fact that the serenity of the home was not disturbed, since the incident took place in the middle of town on a Saturday afternoon. Mr. Smith repeatedly called Mrs. Barstow a "g. d. s. o. b." and a "dirty crook," in tones that grew louder and more excited as the confrontation continued. A large crowd gathered. Mrs. Bartow's attempts to avoid Smith were followed by louder yelling. Certainly this is the kind of behavior that would lead one to say, *outrageous!* The time, place, plaintiff's physical condition and defendant's continued tirade, all contributed to the circumstances. An off-hand slur in a normal tone

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<sup>12</sup> *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N. W. 2d 312 (1963).

<sup>13</sup> *Id.* at 318.

<sup>14</sup> *Lambert, Intentional Infliction of Mental Suffering*, 25 NACCA L. J. 116, 122 (1960).

<sup>15</sup> *Bartow v. Smith*, *supra* n. 3.

under these same circumstances should not be actionable, but this conduct far surpassed mere conversation.

In the past, Ohio courts occasionally have found another hook on which to hold the defendant, *e.g.*, invasion of privacy.<sup>16</sup> Yet, in each of the cases cited, the plaintiff complained of harassment, humiliation, mental anguish, nervousness, etc., and the courts felt that these factors contributed in a large way towards the favorable decisions rendered for the plaintiffs. Justice Crockett, in the *Samms* case,<sup>17</sup> discussing past efforts to allow recovery for emotional suffering by linking it with another tort, wrote:

In recent years courts have shown an increasing awareness of the necessity and justice of forthrightly recognizing the true basis for allowing recovery for such wrongs and of getting rid of the shibboleth that another tort peg is necessary to that purpose.<sup>18</sup>

The dissent in *Bartow*<sup>19</sup> provided a well-reasoned approach for the recognition of the emergence of this new tort. The position of Ohio in allowing recovery in the event the mental suffering is accompanied by contemporaneous physical injury, or if the act is intentional, wilful or wanton, seems to ignore the trend towards the recognition that an act can cause immediate and subsequent mental suffering which in and of itself should be (and in some states is) actionable.<sup>20</sup> But, as seen, on the basis

<sup>16</sup> *Fulton v. Spears & Co.*, 13 Ohio N. P. (n. s.) 473, 28 Ohio Dec. 394 (1912). The plaintiff's furniture was removed by defendant after it was proved that she had purchased it elsewhere. At the time the plaintiff was ill, and she claimed it was aggravated by the shock and humiliation of the workmen entering her room. Here recovery was allowed for unlawful entry.

*M. J. Rose Co. v. Lowery*, 33 Ohio App. 485, 169 N. E. 716 (1929). Mrs. Lowery's furniture was unlawfully removed while she was at the hospital recovering from a serious operation. Recovery was based upon breaking and entering, but the court thought it necessary for recovery of compensatory damages that mental suffering and humiliation be shown.

*Housh v. Peth*, 99 Ohio App. 485, 135 N. E. 2d 440 (1955). A systematic campaign of harassment by defendant to collect a bill. Recovery was allowed for invasion of privacy, but the plaintiffs made much of the mental pain and anguish that resulted in emotional disturbance.

<sup>17</sup> *Samms v. Eccles*, *supra* n. 1.

<sup>18</sup> *Id.* at 346.

<sup>19</sup> *Bartow v. Smith*, *supra* n. 3.

<sup>20</sup> See *Ferrara v. Galluchio*, 5 N. Y. 2d 16, 152 N. E. 2d 249 (1958). This is the famous "cancerphobia" case which is discussed in: Sklar, *Negligence and Emotional Disturbances: The Ferrara Case*, 25 Brooklyn L. Rev. 264 (1959), where the author contends New York has now created an established interest in freedom from mental distress. *Robb v. Penna. R.R. Co.*, 210 A. 2d 209 (Del. 1965) said that negligently caused fright, resulting in illness, is actionable.

of a rule provided in 1908,<sup>21</sup> the courts are reluctant to permit plaintiff's recovery. This rule ignores over fifty years of medical progress in our society.

Even negligently (not intentionally) inflicted mental suffering is actionable in some states, such as New York and Delaware.<sup>22</sup> The test seems to be whether expert medical testimony can prove that a concrete result (i.e., illness) was caused by the defendant's conduct.

In a very recent New Jersey case,<sup>23</sup> the Supreme Court of that state followed the same view. There a woman sitting in a parked car was frightened by the defendant's car striking her husband and then careening towards her car and barely missing it. She became ill as a result. The court, in a 7 to 0 decision, held this to be actionable, and really turning on the adequacy of evidence of proximate causation of her illness. The court said, as to the possibility of a flood of cases:

The proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice.

Ohio's rule clearly is unsound and out of date.

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<sup>21</sup> *Miller v. B. & O. Southwestern Ry. Co.*, *supra* n. 4.

<sup>22</sup> *Ferrara v. Galluchio*, *supra* n. 20; *Robb v. Penna. R.R. Co.*, *supra* n. 20.

<sup>23</sup> *Falzone v. Busch*, N. J. Supr. Ct., Oct. 25, 1965; reported in *N. Y. Times* (A. P.) p. 47 (Oct. 26, 1965).