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Medical Evaluation of Mental Pain and Suffering

Carl E. Wasmuth*

WHAT THE ATTORNEY CALLS "mental pain and suffering" and emotional disturbance is identified by the physician as *stress*, a concept easier to appreciate than to define. The term was probably borrowed from the language of the engineer. Selye, the chief proponent of the term in medicine, employs it to describe the effects of external influences upon the human mind and body. The lawyer seeking damages for his client on the basis of mental and emotional disturbances (mental "pain and suffering") finds proof difficult. Until the sciences supply an accurate measure of mental and emotional disturbances due to stress, the legal profession will drift hopelessly upon the stormy sea of judicial indecision.

The amount of litigation on this subject is large, and conflicting. The limited scope of this paper permits but a brief review of the reasoning of the courts, which ordinarily deny the right to maintain an action predicated solely upon mental and emotional disturbance. In 1861, Lord Wensleydale pronounced the view of the English courts:¹

"Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."

In 1888, an English court² denied recovery for nervous shock in the absence of proof of impact even though serious physical injuries resulted from shock. In reaching its decision, the court reasoned that no prior case was presented by counsel in which damages were allowed under like circumstances. In that same

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¹ *Lynch v. Knight*, 9 H. L. C.: Cas. 577 (1861).

² "The learned counsel for the respondents was unable to produce any decision of the English Courts in which upon such facts as were proved in this case, damages were recovered . . . and their Lordships decline to establish such a precedent." *Victorian Railways Commissioners v. Coultas*, 13 A. C. 222, 226 (1888).

year, a New York court reached the same conclusion in a similar case:³

“We have been unable to find either principle or authority for the maintenance of this action and we have been referred none by counsel.”

Some years later, the Massachusetts Supreme Court held:⁴

“No recovery can be had for fright and mental suffering caused by mere negligence nor for bodily injury resulting solely from such mental distress. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different and it probably rests on the ground that it is impossible satisfactorily to administer any other rule.”

While the English doctrine denying recovery soon was overruled,⁵ the decisions of the American courts are variable. The following excerpts point up the conflict:

“Wounding a man’s feelings is as much damage as breaking his limbs.”⁶

“The law leaves feelings to be helped and vindicated by the tremendous force of sympathy.”⁷

The general rule is that mental injury is assessed in cases of assault, negligence, malicious prosecution, defamation, wrongful arrest, seduction (where it still is actionable), and unlawful search and seizure. Intentional infliction of mental suffering as a separate cause of action was first recognized in cases holding the common carrier liable for insulting a passenger.⁸ An inn-

³ *Lehman v. Brooklyn City R. Co.*, 47 (N. Y.) 355, 356 (1888).

⁴ *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. 88 (1897); *Gatzow v. Buening et al.*, 81 N. W. 1003, 106 Wis. 1 (1900):

“... that mental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages. The true idea is that under the principle applicable to for action, recoverable damages are limited to such as are the natural and proximate result of the act complained of; some physical injury is necessary.” *Palsgraf v. Long Island R. R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928).

⁵ *Bell v. Great Northern Railway of Ireland*, 26 L. R. Ir. 428 (1890); *Dulieu v. White & Sons*, 2 K. B. 669 (1901); *Throckmorton, Archibald H., “Damages for Fright,”* 34 *Harv. L. R.* 260 (1921).

⁶ *Head v. Ga. Pac. Rwy. Co.*, 79 Ga. 358 (1887).

⁷ “The civil law is a practical business system dealing with what is tangible, and does not undertake to redress psychological injuries.” *Chapman v. Telegraph Co.*, 88 Ga. 763 (1895).

⁸ *Chamberlain v. Chandler*, C. C. Mass., 3 Mass. 242 (1823); 5 Fed. Cas. No. 2, 57 J (1823); *Cable v. Atlanta & W. P. R. Co.*, 102 Ga. 474 (1897); *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557 (1899); *Prosser, Torts*, 41 (2d ed. 1955).

keeper, or owners of other premises which cater to the general public, such as theatres, amusement parks, or a telegraph office are likewise held liable for such insults.⁹ But the courts have been reluctant to award damages for mental disturbance which is not accompanied by impact (i.e., some physical contact) or damage to some other specific interest. This rule, however, is relaxed when evidence of the slightest touching of the person or his clothing can be shown. The reasoning of the court for refusing recovery in purely mental and emotional disturbances is disclosed in a few decisions:

"It is impossible to satisfactorily administer any other rule."¹⁰

"He merely incurred risk and peril which caused fright and mental suffering."¹¹

". . . outside the wise policy of the law."¹²

"It is against public policy to allow recovery for damages for personal injuries from fright."¹³

"Damages from fright are too remote to assess."¹⁴

⁹ Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938); Aaron v. Ward, 203 N. Y. 351, 96 N. E. 736 (1911); Dunn v. Western Un. Telg. Co., 2 Ga. App. 845, 59 S. E. 189 (1907).

¹⁰ See Spade case, above, n. 4. Even with contact (glass in food) Ohio denied damages in the absence of "contemporaneous physical injury." Tuttle v. Meyer Dairy Pds. Co., 138 N. E. 2d 429 (Ohio App., decided Nov. 30, 1956, reported Jan., 1957).

¹¹ Canning v. Williamstown, 1 Cush. 451, 55 Mass. 451 (1865).

¹² West. Un. Telg. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674 (1901).

¹³ West. Un. Telg. Co. v. Wood, 57 F. 471 (C. C. A. 5, Tex., 1893), 21 LRA 706.

¹⁴ ". . . no liability exists for fright and its consequences, when such fright is unaccompanied by contemporaneous physical injury." Davis v. Cleveland Ry. Co., 135 Ohio St. 401, 21 N. E. 2d 169 (1939); City of Salinas v. Trospen, 27 Kan. 544 (1882); Atcheson, T. & S. F. R. Co. v. Chance, 57 Kan. 40, 45 P. 60 (1896);

"An injured person cannot recover damages for mental anguish consisting of apprehension which he felt, during the period of convalescence, of termination of his injuries, as such damages would be mental anguish not accompanied by the present infliction of physical injury." Lake Erie & W. R. Co. v. Johnson, 191 Ind. 479, 133 N. E. 732 (1922); Nevala v. City of Ironwood, 232 Mich. 316, 205 N. W. 93 (1925);

Mental anguish, unaccompanied by other injuries to a plaintiff creates no liability for negligence. Holland v. Good Bros., 318 Mass. 300, 61 N. E. 2d 544 (1945); Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937); Burke v. Western Un. Telg. Co., 137 Neb. 878, 291 N. W. 255 (1940).

"Nevertheless, it is a fact that medical science participates less effectively in the administration of justice in the United States than in any comparable civilized country in the world." Reagan, Proceedings of Medicolegal Symposiums. Medical-Legal Problems—This Physician's & Lawyer's Viewpoint (1955). And for late cases and rulings see, Oleck, Damages To Persons & Property, Secs. 177 et seq. (1956 revision).

It is submitted that the real reasons for denial of recovery were the inability of the courts and science to measure emotional and mental disturbances quantitatively, and their fear of fraudulent claims.

The law, however, is in the process of change.¹⁵ A few of the courts now are recognizing the profound effects upon the human body and mind from purely mental or emotional impact. If this trend is to continue, the courts must well demand that their decisions be based on accurate measurements of mental and emotional disturbance.¹⁶

Medicine has made many unsuccessful attempts to evaluate the influence of emotions upon the human mind and body. Walter B. Cannon¹⁷ of Harvard University described the reactions of the body when the brain was stimulated by pain, fear, and rage. Later, Crile and Lower¹⁸ proved that there were no body reactions if the brain was protected from the emotions and that there were no brain reactions if it was protected from pain by anesthesia. While both theories were based on sub-

¹⁵ "An injury to the mind or nerves is generally regarded not as a mere mental and emotional disturbance but as a bodily injury or illness . . . The nerves are as much a part of the physical system as the limbs. . . . We think the general principles of the law of torts support a right of action for physical injuries from negligence, whether willful or otherwise, nonetheless strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs." *Kimberly v. Hawland*, 143 N. C. 398, 55 S. E. 778 (1906) (blasting, fright); *Muse v. Ford Motor Co.*, 175 N. C. 466, 95 S. E. 900 (1918); *Memphis So. Ry. Co. v. Bernstein*, 137 Tenn. 637, 194 S. W. 902 (1917);

"Recovery may be had for mental suffering, as an element of actual damage, regardless of whether physical injury or pecuniary loss was sustained." *Western Un. Telg. Co. v. Homer*, 157 S. W. 2d 658 (Tex.), *affd.* 140 Tex. 193, 166 S. W. 2d 684 (1942); *Crenshaw v. O'Connell*, 235 Mo. App. 1085, 150 S. W. 2d 489 (1941);

"When the action is wanton or willful, there may be recovery for humiliation and mental suffering without any physical injury." *Chicago R. I. & P. Ry. Co. v. Cagle*, 207 Ark. 52, 179 S. W. 2d 151 (1944); *Aetna Life Ins. Co. v. Burton*, 104 Ind. App. 576, 12 N. E. 2d 360 (1938); *Jiles v. Venus Community Center Benev. Mut. Aid Ass'n.*, 191 La. 803, 186 S. E. 342 (1939); *Magruder, Mental and Emotional Disturbances in Law of Tort*, 49 *Harv. L. R.* 1033 (1936); *Earengy, The Legal Consequences of Shock*, 2 *Medico-Leg. & Crim. Rec.* 14 (1934); *Smith, Relation of Emotions to Injury and Disease*, 30 *Va. L. R.* 193 (1944); *Hallen, Damages for Physical Injuries Resulting from Fright or Shock*, 19 *Va. L. R.* 253 (1933); *Throckmorton, Archibald H., "Damages for Fright,"* 34 *Harv. L. R.* 260 (1921); *Prosser, and Oleck*, cited in the preceding footnote.

¹⁶ *Hallen, Damages for Physical Injuries Resulting from Fright or Shock*, 19 *Va. L. R.* 253 (1933).

¹⁷ *Cannon, W. B., The Wisdom of the Body.* New York, W. W. Norton Co., 2nd ed., 1939, 333 p.

¹⁸ *Crile, G. W., and Lower, W. E., Anoci-Association.* Philadelphia, W. B. Saunders Co., 1914, 259 p.

jective or non-specific objective findings, each recognized the effect of the emotions on the body functions.¹⁹ The yardsticks were too qualitative. The law requires a specific quantitative determination so that false testimony can be detected easily and imposture disclosed.²⁰

World War II offered the scientist a great stimulus to study human emotional stress. War imposes the greatest stresses that can be placed upon man. Soldiers on the battlefield violate the basic instinct of self-preservation. From the great research laboratories the results of the studies of stress are just now trickling into the medical literature. From the work of Cannon, we already know that stress produced artificially by the injection of epinephrine does not cause emotional feeling such as anger, rage, or fear. Inferentially, such emotions must be a reaction to environmental influences or stresses.

Hans Selye, in his now-famous book, introduced the theory of stress.²¹ In psychic stress, such as severe emotional disturbances, the individual responds with a characteristic stimulation of the nervous system and secretion of hormones into the bloodstream. Selye divides stress into three stages. Stage I of this general reaction is provoked by stimulation of the nervous system by external conditions. The brain then reacts to the stimulus. The person entertains the sensations of fear, rage, or other emotions. Concurrently, the adrenal gland secretes epinephrine into the bloodstream as a result of the emotional tide. The body now reacts to the emergency. The sugar content of the blood is increased; breathing is faster and the heart rate quickens. This is the alarm reaction and, depending on the personality, results in fright, flight, or fight.

¹⁹ Wiggers, C. G., *Physiology in Health and Disease*. Philadelphia, Lea & Febiger, 5th ed., 1949, 1242 p.

²⁰ "There are obvious difficulties of proof in such cases, so that false testimony as to mental suffering may be adduced easily and is very hard to detect. Hence, this individual interest has to be balanced carefully with a social interest against the use of the law to further imposture." Pound, *Selected Essays on the Law of Torts*, p. 103; but see, Belli, *Modern Trials*, Sec. 44 (1954).

²¹ Selye, Hans, *The Physiology and Pathology of Exposure to Stress*. Montreal, Canada, Acta, Inc. 1950, 792 p. In this book the General Adaptation Syndrome or G. A. S. is described. Stress is divided into three phases: the alarm reaction, the catabolic phase, and the anabolic phase. The alarm reaction corresponds to that described by Cannon. The catabolic phase is that exemplified by the secretion of ACTH and the resultant influence upon the adrenal cortex to secrete glucocorticoids. The anabolic phase or reconstructive phase is entered when the body overcomes the stress and is exemplified by the inhibition of ACTH.

CLASSIFICATION OF STRESS

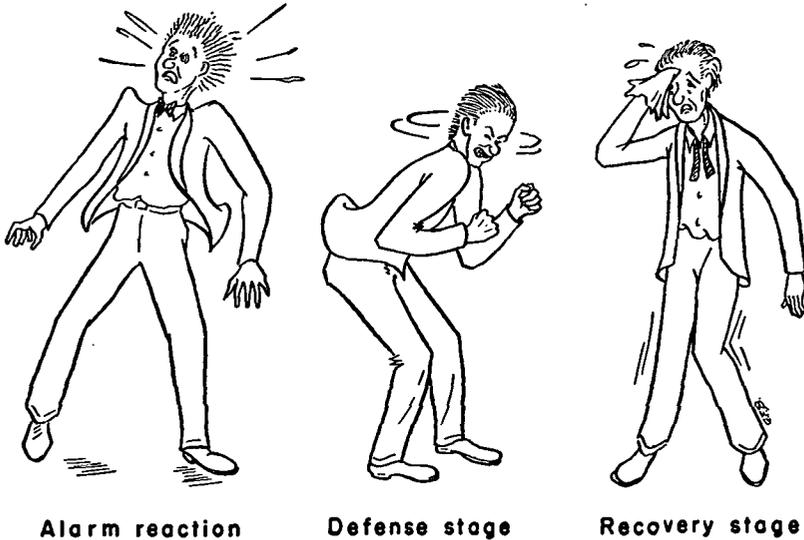
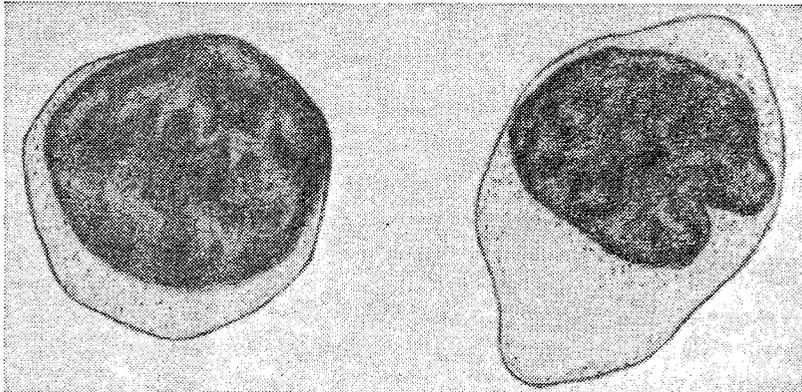


Fig. 1

If the stress is prolonged, the body abandons the emergency alarm reaction and adapts itself at longer sight. This is Stage II. The increased amount of epinephrine in turn causes an increase in the secretion of another hormone called ACTH. ACTH prepares the body for prolonged resistance to stress. Among other reactions it causes the adrenal gland to secrete cortisone. The body's protective defenses are now mobilized for the long pull. If the stresses are of short duration and are overcome, the body enters into the stage of repair (Stage III). If the stresses or emotional factors persist, the body remains in Stage II or reverts again into the alarm reaction.

In summation (Figure 1), the body undergoes three stages in a reaction to a stress. The first stage is one of a basic emotion such as fear or rage to which the body reacts violently but fleetingly. If the stress or emotional disturbance is continued, the body enters the second stage signified by the mobilization of all the body's resources to defend itself. If the mental onslaught is overcome, the body enters Stage III. Accurate clinical tests are required to pigeonhole these rather nebulous mental and emotional disturbances into the hard scientific stress categories.



NORMAL LYMPHOCYTE

STRESS LYMPHOCYTE

Fig. 2

A few tests have appeared in the medical literature which may be used to evaluate emotional trauma. Of particular interest are the investigations describing the variations in the number and change in character of the white blood cells. Dougherty and his associates²² showed that a person upon entering into second stage (Selye) of stress, exhibits a decrease in the number of lymph cells and the appearance of a characteristic type of lymph cell called the *stress lymphocyte* (Figure 2). The presence of these cells according to Dougherty is diagnostic of mild stress. Figure 3 describes the fluctuation in the number of lymph cells in the blood during stress. During Stage I, the total number increases, but as Stage II is entered, not only does the total number fall but cell characteristics change. At this time, the ratio of normal lymph cells and stress lymph cells increases.

Other investigators²³ have become interested in the varia-

²² Kumagai, L. F., and Dougherty, T. F., The Lymphocytic Response as Indicator of Relative Adrenocortical Insufficiency. 55 *Endocrinology* 90-99 (July 1954); Dougherty, T. F., and Frank, J. A., The Quantitative and Qualitative Responses of Blood Lymphocytes to Stress Stimuli. 42 *J. Lab. & Clin. Med.* 530-537 (Oct. 1953).

²³ Wight, A., et al., The Ebb and Flood of Eosinophils in Burned Patients and Their Use in Clinical Management. 137 *Ann. Surg.* 182-183 (Feb. 1953); Coppinger, W. R., and Goldner, M. G., Eosinophil Response to Surgical Trauma. 28 *Surgery* 75-81 (July 1950); Laragh, J. H., and Almy, T. P., Changes in Circulating Eosinophils in Man Following Epinephrine, Insulin, and Surgical Operations. 69 *Proc. Soc. Exper. Biol. & Med.* 499-501 (Dec. 1948); Altschule, M. D., Parkhurst, B. H., and Tillotson, K. J., Decreases in Blood Eosinophilic Leukocytes after Electrically Induced Convulsions in Man. 9 *J. Clin. Endocrinol.* 440-445 (May 1949).

VARIATIONS OF LYMPH CELLS DURING STRESS

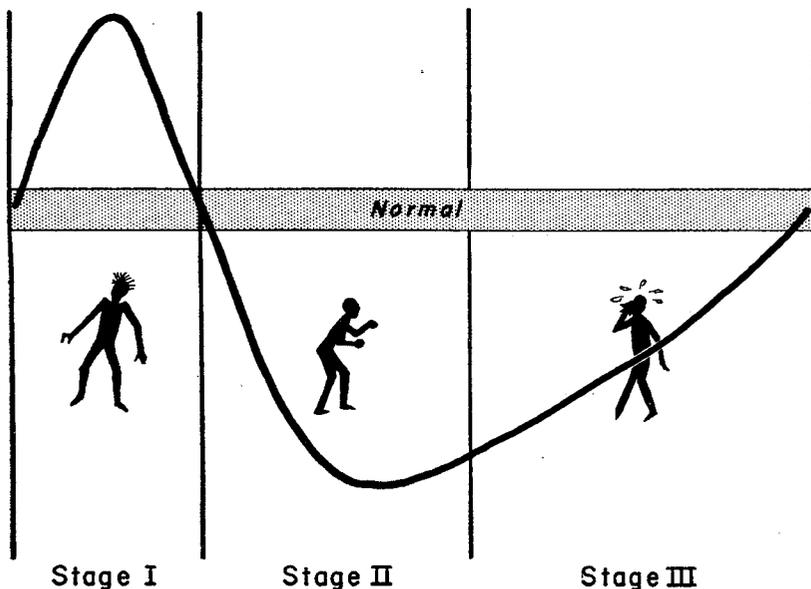


Fig. 3

tions in the number of eosinophils,²⁴ another type of white blood cell, in the blood during stress situations (Figure 4). Of particular interest are the observations of Thorn and his associates²⁵ on eosinophil counts on the members of the Harvard University Crew. They felt that this sport offered ideal circumstances for the investigation of stress situations. The crew consists of oarsmen and a coxswain: the former do all the violent muscular exercises and the coxswain sits quietly in the stern. If exercise is stress, and if stress can be diagnosed by variations in the number of eosinophils in the blood, the oarsmen's counts and the coxswain's count should be in variation during practice runs. Such, however, was not the result. Many oarsmen maintained normal counts as did the coxswain. The picture changed completely, however, when another factor was introduced, namely,

²⁴ The eosinophil is a normally occurring white blood cell which received its name because of the peculiar manner in which it takes stains when being examined. Usually constitutes 2-4% of the total white blood cell count. Individual count: 150 to 200 per cu. mm. blood.

²⁵ Thorn, G. W., Forsham, P. H., Prunty, F. T. G., and Hills, A. G., A Test for Adrenal Cortical Insufficiency; Responses to Adrenocorticotrophic Hormone. 137 J. A. M. A. 1005-1009 (July 17, 1948); Thorn, G. W., et al., Medical Progress; Pharmacologic Aspects of Adrenocortical Steroids and ACTH in Man. 248 New England J. Med. 588-601 (April 2, 1953).

VARIATIONS OF EOSINOPHILS DURING STRESS

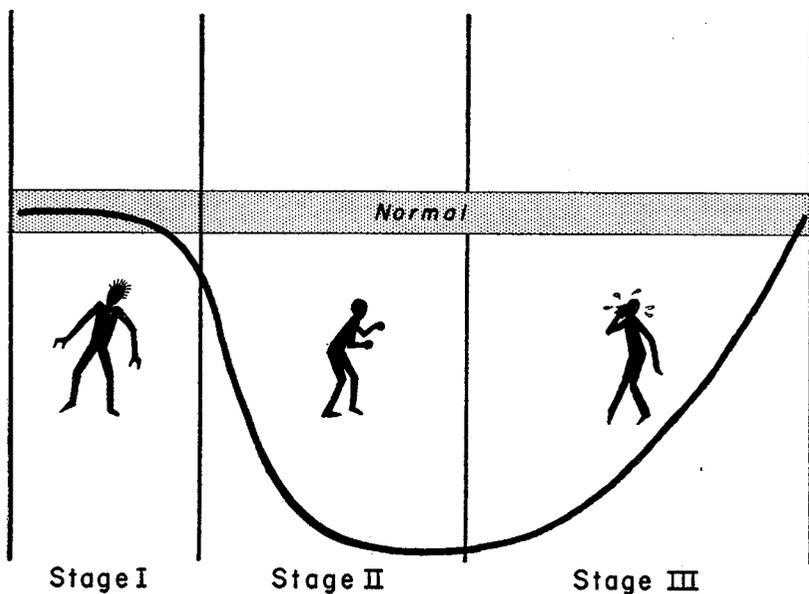


Fig. 4

competition. In a formal meet, excitement and desire to win offered the stress. This time all eosinophil counts were depressed including that of the coxswain. Exercise in the practice runs was not enough to stress all of the members. Stress competition in the varsity meets caused the eosinophils to disappear, not only in the oarsmen but in the coxswain. From these and other experiments, Thorn believes that the eosinophil count is an accurate method of determining stress.

Stress has also been investigated in the patient who is awaiting surgical operation.²⁶ Anticipation of the operation in certain patients may produce a stress situation as severe as that from the actual operation and can lead to prolonged convalescence. The overactivity of the nervous system can lead to exhaustion and a lowered threshold for pain.²⁷ In surgery, the variation in the eosinophil count is related to the severity of the operation. If the stress is great (either of anticipation or of the procedure itself), the eosinophil count drops.²⁸

²⁶ Reichert, F. L., Treatment of Preoperative and Postoperative Stress. 22 Am. Surgeon 317-321 (March 1956).

²⁷ Ibid., n. 26.

²⁸ See note 23.

It is generally accepted that the eosinophil count variation is a fairly reliable index of stress. In many institutions, the eosinophil count is considered to be an accurate objective clinical test of the body's ability to react and to resist stress. The medical profession now recognizes the profound effects of mental disturbance on body functions. Psychosomatic medicine deals with the everyday stresses and the resulting organic manifestations such as ulcerative colitis, stomach ulcers, and migraine headaches, to name just a few. The armed services were confronted with stress problems as battle fatigue.

It is reasonable to assume that many other yardsticks will be forthcoming from the sciences. Advances in electronics (electroencephalography), progress in quantitatively measuring the enzymes and hormones (histochemistry), and research in the function of the components of the nervous system (neurophysiology) are the future hopes in evaluating the mentally and emotionally disturbed patient.

With the great amount of investigation now being performed on this subject, the sciences ultimately will satisfy the requirements of the law with an objective, easily performed and readily available method, to evaluate the human emotions accurately. Such a yardstick will enable the court to assess accurately the damages by mental and emotional disturbance and put it in a position to render to the injured person the full measure of justice to which he is entitled.²⁹ That is the way in which the common law grows.³⁰

²⁹ See note 20.

³⁰ Goodrich H. F., *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497 (1920); and other writers cited above.