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Psychosomatic Injury, Traumatic Psychoneurosis, and Law

Paul David Cantor, M. D., LL. B.*

This paper deals with court decisions on liability claims for injuries to the mind rather than for broken bones alone. This subject now is as important to practitioners and students of the law as it long has been to medical men. Much medical knowledge is now reflected in new interpretations by the courts, so that today the legal fact is established that a person's emotional security as well as his physical security must be protected and compensated. Since injuries to the mind are now so often stated in actions involving physical injuries, practitioners and students of the law must keep abreast of medical progress in this field.

The author's purpose is to focus attention on the developments of recent years as well as those of earlier times, and to demonstrate that interrelated injuries to the mind and to the body should be considered equally compensable.

In discussing the question of liability for psychosomatic injury, it must be borne in mind that there are two sides to the matter—the medical view, and the legal or judicial view—and that until recently a very wide gap existed between them, a gap which is slowly being bridged. To understand why this has been so it is necessary to understand the underlying philosophy of each profession.

The doctor is dedicated to preserving life by curing the ailment if possible, but if complete cure is not possible, then to the alleviation of the attendant pain and discomfort. Quite obviously, the medical profession is constantly searching for better methods, whether surgical or medical. In one sense, medical research primarily is based on a "trial-and-error" philosophy.

The lawyer, on the other hand, primarily is sworn to uphold the law as it is written on the statute books, in the Federal and State constitutions, or, in the absence of specific legislation, as it is inherent in the common law. He is imbued by his training with a conservative approach. The entire system of jurisprudence rests firmly on "precedents," the "ruling case law" evolved over

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the years from the decisions of trial and appellate tribunals. The lawyer, therefore, is dedicated to preserving the "rights" and "duties" which have thus become recognized. Once a workable system has been developed, one which has been tested by judicial opinion, there is no great pressure on the legal profession to substitute untried innovations for the established rules of law.

The divergent approaches of each profession to personal injury litigation become more understandable when viewed in the light of the different philosophies of each.

In addition, the historical basis of the law of torts should be kept in mind. The great Justice Holmes pointed out that in order to understand what the law is "... we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past." 1

The Medical View

In any study of psychosomatic injury there occur constantly certain terms which are more or less unfamiliar to the average lawyer. It is essential, therefore, that we understand the meaning of a few basic terms. These definitions are not meant to be comprehensive medical or psychiatric explanations of the terms, but to give the basic meaning necessary in order to understand the subject. Incidentally, the greatest difficulty encountered in study or discussion of psychiatric subjects is in the definition of terms. In cases where an individual has been examined by several psychiatrists, each diagnosis may be stated in different terms, although the conclusions will be virtually identical. This is not due to a difference of understanding as to the patient's difficulty, but to a difference in terminology. There is no intention here to revise definitions, but only to state them as they will be used in the following pages. If a deeper study is desired, the reader is referred to any of the basic psychiatry texts.

A neurosis is a functional disorder of the nervous system not dependent on any discoverable wound or physical ab-

normality. There are many types of neuroses, classified either as to cause (accident, occupational, war), or as to behavior (anxiety, association, cardiac, compulsion).

*Psyche* refers to the mind; the mental life including both the conscious and unconscious process.

*Somatic* means pertaining to the body; therefore,

*Psychosomatic* is as pertaining to the mind-body relation.

A *trauma* is actually only a force. This may be either a somatic trauma, with an injury to the body tissues, or a psychic trauma, which is an emotional shock that makes a lasting impression on the mind, either the conscious or subconscious mind.

A *neuropath* is an individual with a tendency to neurosis.

A *psychosomatic injury* is one in which there are one or more abnormal somatic manifestations due to psychic trauma.

A *psychoneurosis* is an abnormal behavior pattern due to psychic trauma.

From the similarity in definition of *psychosomatic injury* and *psychoneurosis*, it is obvious that both can be present in the same individual at the same time, and can be caused by or result from the same episode. The difference lies only in the reaction of the particular individual involved. For all practical purposes the terms are used interchangeably. For example, following an automobile accident one person may react in a purely psychoneurotic manner by developing an obsession against riding in an automobile, characterized by fear and nervousness. Another person under the same circumstances may react to his psychic injury by developing a "nervous rash," hysterical loss of voice, paralysis, etc. The difference lies in whether the manifestations are purely behavioristic, or whether they can be shown somatically.

Although the term *psychosomatic injury* may be an unfamiliar one to students of law, it is nevertheless the most commonly occurring injury, and has been stated in one form or another in almost all actions involving physical injury. The author is only attempting to show that these psychoneurotic and/or psychosomatic injuries can and do exist with or independently of somatic damages, and should be considered to be just as compensable. Research has shown that psychosomatism has been known and practiced by man for centuries. From the incantations of the witch doctor driving out the evil spirits to
the taking of the bizarre and foul medicines of the 17th century, there are thousands of examples of psychosomatism, in which man realized that the site of the damage was in the "soul," due to "evil spirits" or due to the "displeasure of the Gods." Even centuries ago men knew that some disease was not physical in nature.

As will be shown below, no physical injury can be completely somatic—that is, limited strictly to the body and having no effect at all on the mind of an individual. All bodily injuries are a combination of physical and emotional disturbance, and only vary in the relative amount of each factor present. For example, in the case of a broken leg there is obviously a great amount of physical injury as represented by the actual fracturing of the bone, but there is also an emotional factor as may be represented in pain, apprehension of the final result, fear of disfigurement and decrease in financial security. Conversely, an individual may be involved in an automobile accident, resulting in only a minor bruise or cut but in a tremendous amount of emotional shock manifested in fear, persistent inability to sleep, inability to eat, nightmares, hysterical anesthesia and paralysis, etc. No longer can an injury be described as either physical or emotional, but rather physical and emotional. The former concept has been gradually displaced in medicine for the past two or three decades. Likewise students of law should now begin to think in this more progressive interpretation. The most concise statement made concerning this field was written in Osler's Principles and Practice of Medicine: "Psychosomatic medicine is that part of medicine which is concerned with an appraisal of the emotional and physical mechanisms involved in the disease processes of the individual patient with particular emphasis on the influence that these two factors exert on each other and on the individual as a whole." It is an established fact that, other conditions being compatible, disturbance of emotion by any cause can produce changes in bodily function, and development of diseased tissues, often as predictably as exposure to bacteria or other bodily enemies.2 One of the most common examples of this is found in patients who, after being under prolonged emotional stress, develop abdominal discomfort, nausea, vomiting, burning, diarrhea, inability to eat and general nervousness. If the stress is continued they frequently develop a demonstrable organic peptic ulcer, colitis,

or other lesion of the gastro-intestinal system, leading possibly to permanent disability or death.

It is not contended that everyone and anyone will develop a psychosomatic injury when subjected to a given emotional trauma. Just as the bones of one person are more resistant to fracture than the bones of another, and one person's resistance to bacterial infection is greater than another's, so every person is individual in his susceptibility to psychic damage. The well-adjusted person is most unlikely to develop a psychosomatic injury when subjected to common emotional circumstances. However, the person already full of frustrations, anxieties and hostilities, and who has a suitable genetic background, is apt to develop a disabling psychosomatic injury if subjected to the same set of circumstances. It has been estimated by the various writers on this subject that about $\frac{1}{3}$ of all patients who consult physicians do not have any definite physical disease to explain their illness. Approximately another $\frac{1}{2}$ of all patients who consult physicians have symptoms that are due in part to emotional factors, even though some organic abnormality may be present. It has been the habit all too often in the past to accuse any person suffering from symptoms not explainable on objective findings of being a faker or malingering who is intentionally, falsely complaining in order to achieve an objective, whether it be family attention or monetary settlement from an insurance company. This will be taken up in greater detail, below.

The possible manifestations of psychosomatic injury are legion. Here truly is the great imitator, as practically all known physical disabilities, as well as countless bizarre symptoms, can be simulated by a psychoneurosis. No attempt can be made to discuss the various forms in this article, but the reader is referred to the three outstanding books on the subject: *The Neurosis*, by Alvarez; *Psychosomatic Medicine*, by Weiss and English; and *Psychosomatic Diagnosis*, by Flanders Dunbar. Some of the most common psychosomatic injuries seen include involvement of all body systems. Everyone has seen or known of a person with a so-called "nervous rash." Thousands suffer from a cardiac neurosis characterized by consciousness of rapid, forceful beating of the heart, chest pain, shortness of breath and other symptoms they have seen in a member of their family or a close friend with heart disease. There are tremendous numbers of women suffering real pain and disability in various parts of their bodies, due only to a fear of cancer after seeing or hearing of such symptoms.
Stuttering and stammering are good examples of mal-functioning muscles involved in speech, due to a psychic trauma or illness. It is safe to say that every student has experienced in various degrees the psychosomatic results of tension and apprehension preceding an important examination. This is commonly manifested by abdominal pain, diarrhea, desire to micturate, heart palpitations, and just plain "shakes."

There is still a great deal of controversy between the proponents of the theories of heredity versus the theories of environment concerning the neuropathic individual. Apparently both factors play a part, as each group presents good evidence. However, the author agrees with Alvarez in his conception of the hereditarily emotionally deficient individual. We do not know how many pairs of genes or hereditary factors go to make up a "normal" human individual, or how many or which particular ones control psychic stability. We do know that if the family histories of neuropaths are sufficiently searched, the chain of psychic abnormalities is quite apparent. This is just another way of saying that the individual is no better than the materials from which he is made. No one will argue that tendencies to certain physical diseases are hereditary, or even that true major psychoses (insanity) occurs with predictable regularity in certain families. However, the concept of an abnormal emotional status seems more nebulous and difficult to perceive. One of the pressing stimuli to the writing of this paper is to crystallize the above facts as they relate to law, particularly in liability and damages. Practitioners of any profession dealing with people should not deal exclusively with illness or lawsuit or job placement, etc., but with human beings and all their ramifications of emotions, reactions, and feelings. It behooves the alert attorney to keep abreast of developments of the study of human behavior, so that he will be more efficient in interpreting and applying the law in every day practice.

Before proceeding to the legal implications of this subject, it would be well to review briefly some facts concerning pain. Most actions concerning personal injury, and certainly all actions concerning psychosomatic injury, include "Pain and suffering." The American Medical Dictionary merely defines pain as "distress or suffering," which is not particularly enlightening.

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3 See, Oleck, Damages To Persons and Property, Chap. 15 (1957 revision).
4 And see, Maloy, Medical Dictionary For Lawyers, 433 (1951) for equally vague definitions.
Pain was considered completely a mental state by Aristotle, and this view was held until well into the nineteenth century. With the developments of advanced anatomical knowledge and the charting of nerve pathways, the concept of pain became purely an anatomical or physiological reaction. Recently, as in the concept of injury, pain is considered a psycho-physiological phenomenon, with a growing emphasis on the psyche.

Pain is made up of at least three components. First the sensation or stimulation of the nervous system at some point. Second the conscious feeling of pure discomfort not connected with any past or future association. Third the body's reaction, which may be fight or flight, protection of the involved part, or any of the possible emotions such as anger, depression, fear, apprehension, etc. As we shall see, this latter factor is most important.

The "pain threshold" is the minimal amount of stimulation which will cause the person to be conscious of pain. This is fairly constant as a rule, but varies with the person's attitude and emotional status.

Since pain is a combination of varying amounts of nerve stimulation plus the mental conversion of the stimulation, it follows that there are all degrees of the various types of pain, ranging from the pain reaction of a normally reacting individual to a pin prick of the finger, to the pain of a part of the body due purely to psychic projection. Cooper and Braceland have divided pain into the following seven classes: The first is the normal perception group, in which the threshold is found to be steady and reaction to stimulation follows what the average person would expect. The second group includes those with a hyper-reactivity. These are people who complain more than usual with minimal amounts of stimulation. They recover poorly from illness and surgery. Frequently these people are thought of as "neurotics" by their fellow workers. The next or third group include the people who have psychic perpetuation of pain long after the original stimulation is removed. Examples of this group include those persons who have become narcotic addicts because of the need for such drugs early in their illness. Even if the organic abnormality is removed, they suffer the original pain if the narcotics are withheld. Another outstanding segment of this group are those who have developed traumatic neuroses. After a trauma they fail to readjust from the fear and apprehension, and the fear initiated by the accident becomes perma-
The pain does not subside, because the person develops an intense fixation to the injury. The fourth group includes the perpetuation of fear due to a psychoneurosis. These people find a great gratification in attention attracted by their illness, and come to fear recovery because they may lose the emotional props of doctors, family and friends. These people spend a lifetime of martyrdom to their pain. The fifth class is known as the "Gestalt" pain group. This group represents pain equally due to physical and mental factors. These are usually exemplified by amputees, who have pain in phantom limbs due to both physical causes and emotional trauma of the loss of the part.

The next group represent pain induced psychogenically, and is represented by tension headaches, painful contractions of the stomach, and low backache. The underlying process in these people is as follows: The person is emotionally immature, and in such a person nervous tension builds up to such an extent that an overflow of nervous impulses flows into a group of muscles, with resulting prolonged contraction and pain. The last group is the one representing psychogenic pain. This group is of no particular importance to the present paper, but only represents the projection of psychic conflicts of the individual to some organ of his body, without abnormal tension in the organ to which the pain is referred.

Closely connected with the subject of pain is malingering. The malingerer is one who willfully and consciously expresses non-existent symptoms and simulated signs of disease, for personal gain. This gain may be financial, as from insurance companies, compensation boards or other defendants; or it may be emotional, as exemplified by increased consideration from other persons, or evasion of responsibility. The neurotic fools himself, while the malingerer tries to fool others. Probably no other single fact has had a more adverse influence on the courts' views of recognition and acceptance of traumatic neurosis than malingering. The dicta of many decisions have voiced a fear that if neurosis is accepted as a basis of recovery, that will open the courts to a flood of unfounded litigation. At one time this may have been a valid consideration, but today, with increased medical knowledge and methods of testing, it is most unlikely. Very rarely, today, can a malingerer recover damages. It would be most unjust to deny recovery to the many because of the possibility of an undeserved recovery in a rare instance.
The obvious attitude of a malingerer is frequently a basis for a strong suspicion of his mental state. He may be resentful of investigation, appear shy and afraid to look at the examiner, or be very assured in the telling of his stereotyped story. He usually will not allow an examiner's assistant to interrogate or examine him. But the neurotic is likely to be anxious to tell his story or to demonstrate his abnormalities to anyone who will listen.

One will almost always get the impression while talking to a malingerer that "all is not well," even though the exact point of deviation is not apparent. There is a lack of sincerity that almost always leaks through. If the malingerer is asked to repeat his story it will almost always be exactly repeated, even verbatim. If he is asked to repeat it from a certain point, he hesitates as if he is mentally running through the learned story to that point, when he will then start to recite it exactly as it was told before. A neurotic, on the other hand, will almost always vary the tale as it is retold.

It is during the physical examination of the malingerer that he can be fooled into making his fatal mistake. To expose the fraud, it is necessary to confuse the patient. This may be accomplished by visual confusion with mirrors, in reversed images and changed distances. If he can be distracted and confused by doing more than one thing at a time, he will be led into making a mistake. He can frequently be exposed by use of mental confusion, by asking and touching while the patient cannot see.

The direction of the fraud will, except for the special senses, be either pain, disturbance of function, or disturbance of sensation.

Contrary to popular belief, it is most difficult to pretend pain of any consequence. In acute pain, a person's pupils dilate, his pulse rate increases and he will complain if the painful part is moved or touched, even if his attention is directed elsewhere. In chronic pain the facial features become drawn and general health is impaired. The face of a malingerer is calm and relaxed, and his general appearance and attitude is not what one would expect if he were suffering pain.

There are many ways of trapping a malingerer claiming involvement of function or muscle power. Based on a knowledge of anatomy, certain movements may be directed in which the malingerer will inadvertently use the supposed paralyzed or weakened muscles. Fraudulent muscle weakness claims may be
exploded by accurately measuring muscle strength in certain anatomical positions.

The fraudulent claim simplest to disrupt is numbness. The patient is incapable of controlling his body’s reaction to painful stimuli applied to supposed anesthetic areas. Furthermore, if only a partial anesthesia is claimed, the person will be unable to accurately map out the area repeatedly as the examiner touches him.

There are a multitude of tests developed towards exposing malingering involving sight. Some examples include confusing lenses in order to change sight distances, different colored lenses in front of each eye while the patient is told to read a chart made up of variously colored figures or letters, converging tubes of sight, examination of the eyeball by means of ophthalmological instruments, and muscular tests of eyelid function. This is a field of testing where a competent examiner can find practically every case of malingering.

Hearing loss is another commonly claimed injury in malingerers. This is usually a futile attempt, as any trained examiner can, without complicated equipment, so confuse the patient that he will be unable to be consistent in stating which ear is hearing sound. A common, simple test is to apply an ordinary stethoscope to the blindfolded patient’s ears while the examiner whispers test words into the opening of the other end of the instrument, meanwhile pinching off the rubber tubing to one and then the other of the patient’s ears. When the examiner insists on promptness of response, the patient soon becomes confused and his futile attempt is obvious.

It is quite clear that diagnosis of malingering should never be made until a complete examination of the person is effected. It is one thing to suspect, but another to prove. In the hands of a capable examiner, malingering can be demonstrated, if present. It is important to distinguish malingering from hysteria, and important to keep in mind that the former is much rarer than the latter.

The Legal and Judicial View

The general purpose of the law of torts is to give protection to the individual against certain forms of harm to person, property or reputation at the hands of his neighbors—not necessarily because they are wrong, but because they are harms. But the individual is not protected from all harms. Unlimited protection
obviously would interfere with equally important enjoyments on the part of his neighbors. The law permits certain things to be done regardless of the fact that harm to another will follow from them. A person owning a piece of land may erect a building which will obscure another's beautiful view, or may establish a business that will compete with and perhaps destroy the business of another. On the other hand, on the ground of public policy the law may throw the entire burden or responsibility on the person engaging in certain transactions, with no regard to culpability. Instances of this type arise in the carrying of pistols, the keeping of vicious animals, and the like. Moreover, as Justice Holmes points out: "Our system of private liability for the consequences of a man's own acts, that is, for his trespasses, started from the notion of actual intent and actual personal culpability."  

In tracing the evolution of recovery for personal injuries, Holmes also reminds us that our theory of damages payable by the defendant stems from the blood feuds of the Roman and Germanic peoples, from which grew the idea of compensation as an alternative to the feud—at first voluntary and later compulsory. He then traces the theory of blood feud or vengeance through the Greek and Jewish philosophies, citing as one of the earliest clearcut expositions of the vengeance principle. *Exodus* (xxi. 28): "If an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit." Note that originally the owner lost the ox—the wrong attached to the thing and was confiscated—and only indirectly was the owner punished. Later the owner was permitted to refuse to give up the animal, or slave or thing, and instead to pay the *value* of the animal, slave, or other object.

As it became customary to permit compensation in lieu of vengeance, the scope of such compensation was limited to the scope of vengeance—vengeance connoting blame—"an opinion, however distorted by passion, that a wrong had been done." Therefore, vengeance, later compensation as an alternative, did not "go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked." 6 This principle of "a harm intentionally inflicted" remained for many years as a necessary element in order to sustain a claim for damages for personal injuries. The cause of action

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6 Ibid., Holmes, p. 3.
originally was always an intentional wrong, causing physical injury. Only after much discussion and argument was it extended, first to include harms which were foreseen, but which were not the intended consequence of the defendant's act, and then still later to unforeseen injuries.

Like medicine in its early days, the practice of law then was much more primitive, and the right of action was a narrow and limited one. Even though a wrongful act was committed the wrongdoer was liable only for the "natural, and direct or proximate consequences" of his act or omission. As a corollary, remote consequences of such act or omission would not constitute a basis for recovery. Originally, no cognizance was taken of anything that could not be seen and definitely weighed. Damage to a property right was the real basis of action, along with personal injury resulting in impairment of earning power, or injury to a man's spouse or child because in a sense they were his "property" and he was entitled to their productivity, or prospective earnings.

Fright, mental disturbance and the like cannot be seen and weighed. Moreover, until recently mental illness as such went unevaluated even by the medical profession. Insanity, whether mild or violent, was considered to be the result of the individual's own sins—a punishment which one should not seek to mitigate. It is not surprising therefore that the law took no cognizance of mental suffering, particularly when in fact it was not put forward as an item of the damages sought. The general rule therefore—developed over a period of time—was that mental pain and suffering, standing alone, would not constitute a sufficient basis for recovery of substantial damages. There were exceptions, such as for injuries to personal security, character or reputation, domestic relations of the injured person, or where mental suffering was recognized as the ordinary, natural and probable consequence of the injury complained of.

As the medical profession began to look upon mental health as an integral part of a completely healthy and vigorous individual, more and more studies conclusively sustained the concept that the individual is the end product of the interaction of the "psyche" and the "soma." As this conclusion was increasingly brought to the attention of the courts in personal injury cases, the strict interpretation of "foreseeable" consequences also underwent a change. Gradually, the courts began snipping away the doctrine so impressively stated by Lord Wensleydale in
Lynch v. Knight, "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."  

Perhaps the best exposition of the drastic changes in the judicial view is found in a comparison of the applicable sections of the Restatement of the Law of Torts as originally published by the American Law Institute in 1934, and as revised in 1948.

Under the heading "The Interest in Freedom from Emotional Distress—Conduct Intended to Cause Emotional Distress Only" the Restatement (1934) stated:  

"Except as stated in sec. 21 to 34 and sec. 48, conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability

(a) for emotional distress resulting therefrom, or

(b) for bodily harm unexpectedly resulting from such disturbance."

This was followed by certain comments, among them:

"Extent of legal protection to interest in freedom from emotional distress. The interest in mental and emotional tranquility and, therefore, in freedom from mental and emotional disturbances is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance. Conduct, either of act or omission, which is intended or likely to cause only mental or emotional distress is not tortious. Therefore, it cannot subject the actor to liability no matter what its consequences..."

The Comment went on to say that even should the conduct result in an invasion of the other's interest in bodily security, or an invasion of any other of his interests (which are protected against tortious invasion whether intentional or negligent) the actor would not be liable.

Less than fifteen years later the Restatement, as revised, read thus:

"One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable

(a) for such emotional distress, and

(b) for bodily harm resulting from it."

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8 Sec. 46.
9 Sec. 21 to 34 deal with highly specialized forms of mental disturbance arising from realizing that a harmful or offensive contact is contemplated. Sec. 48 deals with liability of carriers for insults by their servants.
(Note: Sec. 47 provides that where one intends bodily harm and only mental disturbance results, he is not liable for the mental disturbance. However, if by his conduct the actor becomes liable for any invasion of any legally protected interest, then the mental disturbance is taken into account in assessing damages.)

The Revised Restatement also has this comment:

"This is a part of the law of torts in which real developments have occurred in recent years and this development is continuing. The cases which have appeared since 1934 establish that the interest in freedom from severe emotional distresses protected against intentional invasion. . . . The change in section 46 is necessary in order to give an accurate Restatement of the present American law. There is a definite trend today in the United States to give an increasing amount of protection to the interest in freedom from emotional distress."

Of even greater interest is the fact that the original Restatement contains no Caveat to this section, while the 1948 Revision contains the following:

"The Institute expresses no opinion as to whether one who recklessly causes severe emotional distress to another is or is not liable for it.

"The Institute expresses no opinion as to whether one who negligently causes severe emotional distress is, in certain circumstances, liable for it."

Judicial opinion regarding compensation for bodily injuries has progressed in three stages:

1. Compensation was awarded for wrongful death, or maiming which interfered with the ability to earn a living. The wrongful act had to be intentional—negligence, no matter how gross, would not create liability.

2. Negligence that was flagrant and "in reckless disregard of the rights of others" eventually was considered to create liability, and less serious bodily injuries were adjudged compensable.

3. The present attitude of the courts is that where one is under a duty, express or implied, negligence may be imputed from conduct which results in injury to another.

Damage to one's reputation grew out of the assumption that such injury resulted in a lessening of the ability to earn a living, and was therefore compensable. A similar theory underlay protection of a woman against attacks on her virtuous reputation—
it lessened possibility for marriage. Mere superficial injuries to the body were not at first considered to warrant an award unless, as in the case of the loss of an arm or leg, the earning capacity of the individual was seriously affected; the damages awarded might be merely nominal. Gradually, lesser injuries (when intentionally inflicted) were considered to be compensable, and still later negligence was held to create liability.

In the case of "psychosomatic" injuries\(^\text{10}\) the evolution of judicial opinion has followed the same path, and the degree of liability has been expanded along somewhat the same line: first, when arising contemporaneously with traceable physical injuries; next, physical injuries arising after the wrongful act and stemming from the shock, fright, or trauma; and last and most recent, for mental injury where no physical injury occurs. Here too, as in the case of bodily injuries, the courts more and more created a "fiction" of touching and contact, in order to sustain a causal chain of consequences.

Where there has been an intentional wrongful act, the courts are almost unanimous in holding that such an act creates a liability on the part of the actor.

A fifteen year old girl was allowed to recover for mental anguish, nervous shock, and serious and permanent injuries to her health when the defendant charged her with unchastity and threatened her with reform school unless she confessed to a misdeed, in *Johnson v. Sampson*\(^\text{11}\). The Court said: "... we see no

\(^{10}\) It is interesting to note that the term "psychosomatic" is still generally unknown in legal terminology insofar as the cases, digests and law reviews examined indicate. Cases which would properly fall under the definition of psychosomatic injury as used here are variously found under such headings as "nervous hysteria," "nervous shock," "fright," "psychic trauma," and "traumatic neurosis."

All of these are conditions which give rise to symptoms and/or signs which cannot be traced to any physical, demonstrable change in either the nervous systems or the organs of the body and are therefore acknowledged to be due to psychological causes. Among the most commonly reported symptoms are: loss or impairment of vision, hearing or memory; loss or impairment of muscular control; impairment of speech; hysterical paralysis; muscular twitchings; convulsions; violent weeping; irritability; disturbed sleep or sleeplessness; tremors and trembling; loss of weight; rapid and strongly beating heart; and general anxiety and discomfort.


\(^{11}\) 167 Minn. 203, 208 N. W. 814, 46 A. L. R. 722 (1926).
good reason why a wrongful invasion of a legal right, causing an injury to the body or mind which reputable physicians recognize and can trace with reasonable certainty to the act as its true cause, should not give rise to a right of action against the wrongdoer, although there was no visual hurt at the time of the act complained. . . ."

There exists also a large body of judicial opinion to the effect that even though the objective is a lawful and legal one, such as the collection of a debt, wrongful and intentional means of accomplishment create a liability, nevertheless. Examples of these are found in the so-called "collection cases." A milestone in this field, and one which has been quoted frequently, is *Barnett v. Collection Service Co.*, an Iowa case decided in 1932. This case was a forward step in recognition by the courts that one who causes emotional distress—even when no physical contact is involved and the object is lawful—creates for himself a liability for the results. A widow with two children, employed by a drygoods company, incurred a debt for coal, which was turned over to the agency for collection. The language in the dunning letters was coarse, threatening to sue, to "tie [you] up tighter than a drum" unless settlement was made; to bother her employer "until he is so disgusted with you that he will throw you out the back door"; suggesting she was as bad as a criminal, and similar statements.

The court, per Faville, J., went over the leading cases in the jurisdiction (prefacing the review by this comment: "A reconciliation of all the cases is impossible") and reviewed those in other jurisdictions on this point. It then drew a distinction between injuries resulting from fright caused by negligence, where no physical injury is shown, and that of fright due to a willful act, although neither negligence nor physical injury is alleged.

The reasoning in the *Barnett* case was followed by the Supreme Court of Nebraska two years later in *LaSalle Extension University v. Fogarty*, and was cited by the court in its opinion. In *Kirby v. Jules Chain Stores Corporation*, the Supreme Court of North Carolina (1936) upheld a verdict awarding damages to plaintiff for illness and a miscarriage resulting from angry and profane language used to her by the defendant's bill collection agent.

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12 242 N. W. 25.
13 253 N. W. 424 (1934).
14 188 S. E. 625.
Chief Justice Stacy in his opinion said that the gravamen of the complaint was trespass on the person, which "may result from an injury either wilfully or negligently." Referring to Hill v. Kimball, where the facts were similar, Justice Stacy quoted from the opinion in that case: "That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt. . . ."

Another case cited by Justice Stacy was Engle v. Simmons, which was an action of a similar nature, in which the court commented that physical violence to the person is not necessary in order to sustain an action.

Taking cognizance of the divergent views in some opinions, nevertheless Justice Stacy felt that,

". . . much of the confusion on the subject seems to have come from worshipping at the shrine of words and formulas, rather than applying correct principles to the facts in hand. (Citing cases.) It is no doubt correct to say that fright alone is not actionable . . . but it is faulty pathology to assume that nervous disorders of serious proportions may not flow from fear or fright. . . ."

The Court of Appeals of Georgia took a similar view in 1937, as did the United States Court of Appeals for the District of Columbia in 1939. The first case, Interstate Life & Accident Co. v. Brewer, is particularly interesting because the decision contains a quotation from a previous opinion of the same court:

"Even in the absence of willfulness or wantonness, the mere wrongful act of the agent will authorize a recovery where the resulting fright, shock, or mental suffering is attended with actual immediate physical injury, or where from the nature of the fright or mental suffering there naturally follows as a direct consequence, physical or mental impairment; and in either of such events the fright or mental suffering can itself be considered, together with the accompanying physical injury or such resulting physical or mental impairment, as an element of damages."

Equally far reaching was the opinion in the second case mentioned, another bill-collector case: Clark v. Associated Retail Credit Men of Washington, D. C. In that case the court pushed aside the defense that the peculiar physical condition of the plain-

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15 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 619 (1890).
16 148 Ala. 92, 41 S. 1023, 7 L. R. A. (N. S.) 96 (1906).
17 193 S. E. 559; 47 Ga. App. 778, 780.
18 105 F. 2d 62.
tiff was a factor in the injuries he suffered. This decision demonstrated that the concept of psychosomatic illness was beginning to permeate judicial decisions, even though the term itself did not appear. The court said:

"... If we are in one of the 'open spaces' in the law of this jurisdiction we must fill it as well as we can, with a view to the social interests which seem to be involved and with such as we can get from authorities elsewhere and from 'logic and history, and custom, and utility, and the accepted standards of right conduct...' 19

"In legal terminology, 'bodily harm is any impairment of the physical condition of another's body or physical pain or illness' 20 and 'the minute disturbance of the nerve centers caused by fear, shock, or other emotions does not constitute bodily harm,' 21 although it may produce it. The conventional terminology is used in this opinion. But lawyers have begun to learn from doctors and physiologists that 'We fear not in our hearts alone, not in our brains alone, not in our viscera alone—fear influences every organ and tissue.' 22 'And what is true of fear is true in kind, though not in degree, of the lesser emotions such as worry and anxiety.' 23 The tendency of the law to ignore 'mental' harm diminishes. The notion that it cannot give redress for such harm is long since exploded; it can, and it frequently does—usually in connection with harm of other kinds, as in battery, false imprisonment and defamation. 24 But the conventional distinction between mental and physical harm still plays a large part in the law....

"'We would expect... the gradual emergence of a broad principle somewhat to this effect: that one, who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquillity of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturb-

20 Am. Law Institute, Restatement of the Law of Torts, Sec. 15.
21 Ibid., Comment B. "Severe shock" alone is recognized as a form of "ill health" or "illness" in Owens v. Liverpool Corporation [1938], 4 All Eng. 727 (Court of Appeal).
23 Ibid., Goodrich, op. cit. p. 503.
24 In connection with forcible ejection from a train for example, it is recognized that "Wounding a man's feelings is as much actual damage as breaking his limbs." (Cases cited.)
ance even though no demonstrable physical consequences actually ensue. 25

"In the present case the shock which defendant intentionally inflicted not only risked, but actually caused, physical pain. In such circumstances, recovery has repeatedly been allowed." 26

Where negligent acts caused fright or shock which in turn resulted in physical injury, the courts as far back as the early 1900's had begun to pierce the artificial barrier precluding recovery. One of the early cases where damages were awarded for physical injuries stemming from shock was Pankopf v. Hinkley,27 decided in 1909 by the Supreme Court of Wisconsin. In this case a woman was awarded compensation for a miscarriage caused by defendant's negligence in running his automobile into a horse-drawn vehicle in which she was riding.

The judge distinguished the facts from those in the leading Wisconsin cases28 which had set out the doctrine then prevalent that there can be no recovery for damages for "mere mental anguish, which is not preceded by or accompanied with some physical injury." In this case, the physical injury (miscarriage) was a subsequent result of the fright.

Compare this decision with the Massachusetts results reached in Spade v. Lynn & B. R. Co.29 in 1897; and by the New York Court of Appeals in Mitchell v. Rochester Ry. Co.30 in 1896. The courts in those cases held (in conformity with the Pennsylvania rule at that time, which in turn was based on an English Case)31 that there could be no recovery for a physical illness due entirely to the internal operation of fright, there being no immediate physical injury caused by the defendant's conduct.

Spade v. Lynn has been the cause of a good deal of dicta in attempts to differentiate it from later cases. According to the

25 And see, Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1058 (1936).
26 Recovery has even been allowed in various types of cases in which defendant has unintentionally but negligently subjected plaintiff to a mental shock likely to result, and actually resulting, in physical harm.
27 123 N. W. 625.
28 Summerfield v. W. U. Tel. Co., 87 Wis. 1, 57 N. W. 973, as affirmed in Gatzow v. Buening, 106 Wis. 20, 81 N. W. 1003, and subsequent cases.
30 151 N. Y. 107, 45 N. E. 354.
31 Victorian Ry. Commrs. v. Coults, L. R. 13 App. Cas. 222 (1888), which had already been overruled in England.
court, the general rule "... limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied." 32

This "general rule," however, was already being breached, and logically so, even fifty years ago. There is no real legal justification for it. Any justification rests on so-called public policy and expediency, based on the reasoning that it is impossible to measure degrees of fright or to adjudge just compensation, and that to grant compensation would open the courts to many false claims. That this is illogical is apparent when one realizes that allowance is made for mental pain and for injury to mind and nerve as well as body, generally in all cases of liability for personal injury where there is impact. 33 It would obviously be just as easy to malinger in such cases—and as difficult to detect—as in cases where there is no impact and fright is the intervening agency of transmittal. When neurasthenia is claimed as a result of bodily injury, the connection between the injury and the disease, and the extent and severity of the disease, are no less uncertain and subject to objective tests than when fright takes the place of bodily impact. It is true that the fright itself may be an issue not easily challenged when met, but this does not seem to be sufficient reason to lay down a rule shutting out recovery for its consequences in all cases.

In order for liability to attach to a wrongful negligent act, it was held in the earlier cases that there must have been an actual impact, a "touching" of the person of the plaintiff. This in turn led to much strained interpretation of what constituted a "touching," in order to differentiate the individual cases from the doctrine laid down in Spade v. Lynn and Mitchell v. Rochester Railway Co., supra. However, in a case decided ten years after these two decisions (1907), the Supreme Court of Rhode Island in Simone v. Rhode Island Co., 34 said that where physical troubles follow fright—they need not accompany it—an action will lie, even in the absence of any contact—fright.

After noting that defendant had not cited Spade v. Lynn & Boston R. R. Co., 35 the court went on to discuss extensively Bell

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32 For a discussion of this general view, see The Black Gull, 82 F. 2d 758 (C. C. A. 2, 1938).
33 Wasmuth article, supra, n. 2; Prosser, Law of Torts, Sec. 37 (2d ed., 1955).
v. Great Northern Railway Co., quoting extensively from the opinion, which closed as follows:

"In conclusion, then I am of the opinion, that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be 'a consequence which, in the ordinary course of things, would flow from the' negligence, unless such injury 'accompany such negligence in point of time'."

The court also cited Purcell v. St. Paul City Ry. Co., which held that if through the negligence of a carrier a passenger is placed in imminent danger, sufficient to cause fright, which in turn causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which damages may be sought.

The court noted with particular approval Dulieu v. White & Sons, in which plaintiff, who was pregnant, while serving behind her husband's bar was frightened by a van and horses being negligently driven into the room. As a result of the shock she became seriously ill and later gave birth to an idiot child. She was held to have a good cause of action.

The same court which held (Mitchell v. Rochester Ry. Co., supra) that there could be no recovery for a physical injury due to the purely internal operation of fright or other emotional disturbance, "there being no immediate physical injury caused by the defendant's conduct," thirty-five years later completely reversed itself, in Comstock v. Wilson. Plaintiff and his wife, riding in his car, were both jarred by a collision with defendant's car, which also loosened a fender. Plaintiff's wife stepped from the car and began to write down the defendant's name and license

(Continued from preceding page)

Comrs. v. Coultas, supra, n. 31, which had already been discredited in England. All these dealt with actual physical or nervous disorders resulting from negligence. Other cases cited by defendant were for mere fright unaccompanied by any immediate physical injury, nor resulting in any nervous physical or nervous disorder.

37 48 Minn. 134, 138, 50 N. W. 1036, 16 L. R. A. 203 (1892).
39 70 L. J. (Kings Bench Div.) 837, 842.
number, and while so doing fainted, and in falling fractured her skull, all within a few minutes of the accident, and twenty minutes later she died from the skull injury. The court awarded damages.

In Sider v. Reid Ice Cream Co., the same court in 1925, in finding for plaintiff, had called for a change in the unrealistic old rules.

In addition to cases where the negligent acts of the defendant result in an actual impact causing slight or very grave injury, accompanied by shock or psychic trauma producing psychologically induced injuries and emotional distress, where such results follow the invasion of some other legally protected interest, the courts are practically unanimous that recovery may be had. Once the defendant's negligence has been proven and directly connected with plaintiff's injury, it creates a liability for all consequences actually caused by the negligence, and plaintiff's previous condition of health (as predisposing him to injury) may not be offered as a defense. Purcell v. St. Paul City Railway Co., and Flood v. Smith, stated this rule clearly.

One who sustains the slightest bodily injury by immediate contact, may recover for an illness brought on not only by the shock of receiving the injury but for an illness brought on by the fear of receiving it, and for all emotional distress whether severe or minor. In Wells v. Home Indemnity Co., plaintiff developed severe attacks of nausea and vomiting a few days after an accident—diagnosed as traumatic neurosis. The Court held that it was immaterial that physicians failed to find any objective symptoms of injury to the plaintiff. In Thompson vs. Aetna Life Ins. Co. of Hartford the court upheld the claim of plaintiff for total disability, under an insurance policy, where plaintiff developed nervous spells and irritability and was obsessed with fear that he would do harm to his wife and child physically, after a piece of steel flew into his eye from the machine he was working on. Where plaintiff, an electrical engineer working as a lineman for defendant, received a slight shock from a wire negligently left open by defendant's agent, seemed uninjured physically but

41 211 N. Y. S. 582.
42 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203 (1892).
43 126 Conn. 644, 13 A. 2d 677 (1940); and see Owen v. Dix, 210 Ark. 562, 196 S. W. 2d 913 (1946).
44 1 F. 2d 453 (La. App. 1942).
45 177 S. C. 120, 180 S. E. 880 (1935).
became hysterical, temporarily paralyzed, and then began to twitch and shake, and developed a morbid fear of electricity, he recovered for his psychosomatic injuries. For a thorough discussion of these types of cases and a listing of cases by states, see Johnson & Sampson, Traumatic Neuroses in Court; and Smith, Relation of Emotions to Injury and Disease, 30 Virginia Law Review 87 and 194 (1943).

Although no case has been taken to the Supreme Court recently on which prior rulings might have made obsolete its rulings on this point, the Federal courts are slowly coming to the view of the majority of the State courts. A recent evidence of this is found in Kaufman v. Western Union Telegraph Company, decided by the United States Court of Appeals for the 5th Circuit, July 28, 1955 (rehearing denied August 31, 1955). The case was the result of defendant's messenger erroneously delivering and announcing a telegram as a "death message," when in fact it merely notified the sender's mother of her anticipated arrival. A summary judgment for the defendant was reversed and remanded.

Indicating the frame of mind of the court, the court said "No doubt the law as to liability for mental anguish alone is in a stage of development," and then quoted verbatim Section 46 of the Restatement as revised. The closing words of this opinion would seem to foreshadow the probable future view of the Supreme Court, and certainly the position the federal courts will take:

"Enough has been said to indicate that the literature on the subject is voluminous, if not exhaustive . . . For ourselves, we can see no more reason for denying recovery where physical injury follows mental anguish than in those cases ordinarily encountered where mental anguish follows physical injury."

The third class of cases is even more significant for our present discussion: namely cases in which the wrongful act is negligent, where there is no physical injury in the strict sense of the word. In Netusil v. Novah, the owner of a vicious dog was held liable for the shock and nervous prostration suffered by the plaintiff, walking along the street outside the defendant's

47 224 F. 2d 723.
48 120 Nebr. 751, 235 N. W. 335 (1931); and Note, 13 Nebr. L. R. 422 (1935).
grounds, when the dog crouched down in a menacing way, bared its teeth, and growled at her. The dog did not leave his owner's property, but the plaintiff had on a previous occasion been attacked by the dog, and on the occasion in question was so frightened that she fainted. The court held that there is a liability for physical injuries which are proximately caused by fright and terror produced by one who owes a legal duty to the one injured.

Another recent case (1945) is extremely interesting and quite unusual. In Blakely v. Shortal's Estate, the Supreme Court of Iowa said that the rule denying liability for injuries resulting from fright, where no physical injury is shown, cannot be invoked where fright was due to a willful act, and that the term "willful act" contemplates a voluntary or intentional act.

The Supreme Court of Montana, in a case involving a carrier, Cashin v. Northern Pac. Ry. Co., had laid special emphasis on the following statement:

"... It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. 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 system... 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."

The unusual feature of the Blakely case is that the action resulted from a claim in probate filed by a woman in whose kitchen the decedent had committed suicide. The sight of the bloody horror had terrified the plaintiff. The lower court held that no cause of action had been proven since it did not exist at the death of the wrongdoer and therefore, there was "no cause of action to survive. It is a general rule that a cause of action for tort does not arise, or is not complete, until there is an injury." The Supreme Court reversed on the ground that the cause of action did survive, and having survived it then became a question of whether a cause of action was proven, since the

49 236 Iowa 787, 20 N. W. 2d 28; Noted, 44 Mich. L. R. 486 (1945).
50 See the criticism of the view that fright caused by blasting is merely an indirect harm, for which no recovery can be had without proof of negligence, in Louden v. City of Cincinnati, 90 Ohio St. 144, 106 N. E. 970 (1914), L. R. A. 1915 E.
51 96 Mont. 92, 28 P. 2d 862 (1934), citing the Sloane case, above, n. 38.
injury and damages were due to fright, and in the absence of other physical injury. It appears that the case was subsequently settled. In a similar Ohio case in 1929 recovery was denied. 52

But in 1956 Ohio granted damages for mental injury on the theory of invasion of privacy, contrary to its old requirement of impact. 53 Texas employs the theory of assault, for the same purpose. 54 South Carolina uses the theory of nuisance. 55 Various devices thus are used in order to avoid the old requirement of impact, in many jurisdictions. 56

In cases where the problem of liability for physical consequences of emotional disturbance has come before the courts in connection with the Workmen's Compensation Act, the courts have been liberal in allowing compensation. This is not surprising when one realizes that the compensation system is maintained, not to penalize the industry for its misconduct, but to take care of the victims of work-accidents. 57

Conclusion

The author's aim has been to focus attention on developments in the field of recovery for psychosomatic injuries, and at the same time to try to trace the evolution of the present concept that liability in some instances may arise without any discernible physical injury. The experience and study of the medical profession are becoming increasingly influential in these legal decisions, which now reflect what has long been apparent to the physician—that the individual's emotional and physical security are not, and cannot, be completely compartmentalized or isolated from each other.

Actions involving physical injuries more and more frequently will include counts relating also to injuries to the mind, and the forward steps in medicine will be mirrored in legal interpretations.

56 See, King, Some Recent Developments in the Law of Torts, 137 N. Y. L. J. (36) 4 (Feb. 21, 1957); and for current developments see NCS (curr. issues, Oleck, ed.).
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