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Torts—Expanding the Concept of Recovery for Mental and Emotional Injury

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TORTS—EXPANDING THE CONCEPT OF RECOVERY FOR MENTAL AND EMOTIONAL INJURY

I. INTRODUCTION

Liability for negligently caused mental and emotional injuries is one of the most controversial and complicated areas in the field of tort law. Over the past century, and especially during the last three decades, its development has run the gamut from a mere parasitic action to an independent action in tort. Nevertheless, case law is still in a state of confusion. Some courts, in an effort to justify recovery for mental and emotional injury, have created myriad theories to bring the remedies within the scope of already existing tort actions. Others have rejected recovery with an equal amount of justification. As one author aptly suggested, "[a]ny attempt at a consistent exegesis of authorities is likely to break down in embarrassed perplexity."2

Nevertheless, a trend toward the recognition of the right to recover for mental and emotional injuries has clearly developed,3 although West Virginia courts have yet to allow recovery for negligently caused mental injuries without accompanying physical injuries. West Virginia's failure to keep pace with this trend is evidenced by Monteleone v. Co-Operative Transit Co.4 In Monteleone, the West Virginia Supreme Court of Appeals recognized that recovery could be sustained where: (1) Mental disturb-

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1For an examination of the various theories, see Harper and McNeely, A Re-examination of the Basis for Liability for Emotional Distress, 1938 Wis. L. Rev. 426.
3See, e.g., Battalla v. New York, 10 N.Y.2d 237, 176 N.E.2d 729 (1961). In that case the court noted that the doctrine of no recovery for mental injuries incurred by fright has been rejected by a majority of American jurisdictions, abandoned by many which originally adopted it, and diluted by the minority that retained it. Id. at 239, 176 N.E.2d at 730. See also app. I infra.
4128 W. Va. 340, 36 S.E.2d 475 (1945). Subsequent West Virginia cases establish a trend of allowing recovery for mental and emotional injuries; however, each recovery has been predicated on some ground other than solely negligent infliction of emotional harm. See Bishop v. Byrne, 265 F. Supp. 469 (S.D.W. Va. 1967) (recovery disallowed for mental suffering caused by the defendant's negligent sterilization operation on plaintiff's wife); Julian v. DeVincent, 184 S.E.2d 535 (W. Va. 1971) (recovery disallowed for mental suffering caused by death of plaintiff's dog, killed by defendant's dog); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959) (recovery allowed for mental suffering when trespass or invasion of privacy); Toler v. Cassinelli, 129 W. Va. 591, 41 S.E.2d 672 (1946) (recovery allowed for mental suffering caused by defendant's unreasonable and willful conduct).
ances accompany or follow actual physical injury caused by impact at the occurrence of the tort; (2) no impact or physical injury occurs at the time, but a physical injury later results as the causal effect of a nervous shock which in turn was the proximate result of the defendant's wrong; and (3) no impact or physical injury is caused by the defendant's wrong, but an emotional or mental disturbance is shown to have been the result of the defendant's intentional or wanton wrongful act. However, the court summarily rejected a fourth category based on recovery for mental and emotional injuries caused by negligence alone, unaccompanied by bodily injury. This category was swiftly passed over by the court as encompassing merely embryonic legal theories. These embryonic theories have already reached fetal stages. With current advancements in medical technology and continual evolution of a cause of action in tort for psychic injury, the time is ripe for analysis and discussion of legal actions for negligently caused mental and emotional injuries.

The Monteleone decision, the last major word of the court on this topic, provides the lawyer with little assistance in the area of negligently caused mental and emotional injuries. Therefore, the purpose of this note is to provide current insight into this area and, ultimately, to show that a mental and emotional injury can and should create a cause of action with recovery based on the merits of each individual case. The approach is threefold: (1) To examine the history and development of emotional and mental torts in West Virginia by analyzing the major West Virginia cases; (2) to elucidate the various medico-legal problems which are paramount; and (3) to discuss the possible theories in support of a cause of action for mental and emotional torts.

II. BACKGROUND OF MENTAL AND EMOTIONAL INJURY LAW IN WEST VIRGINIA

A. Prior to Monteleone

Although the Monteleone case was one of first impression in West Virginia in determining whether there could be recovery for

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2 Id. at 347, 36 S.E.2d at 478.
3 The court's reason for even commenting on these embryonic theories was, in its own words, to "illustrate a phase of the perpetual evolution of the common law in its effort to keep abreast of development and progress." Id. at 347, 36 S.E.2d at 478.
posttraumatic psychoneurosis\(^7\) caused by shock, prior cases dealt with recovery for mental and emotional injuries.\(^8\) As early as 1899, the West Virginia Supreme Court of Appeals propounded the impact rule as a requisite to recovery for mental injury. By way of dictum in Davis v. Western Union Telegraph Co.,\(^9\) the court recognized that mental suffering without physical injurs would not sustain an action for damages because mental and emotional injuries were too vague and subjective in nature to warrant compensation. The court noted an exception, however, in cases where such damages were so inseparably connected with physical pain that they became indistinguishable.\(^10\)

Again, in 1910, the court, in Pennington v. Gillaspie,\(^11\) denied recovery for mental injury, declaring that mental suffering, sorrow, fear, and anxiety caused by humiliation through public degradation would not alone permit recovery without proof of actual injury to person, property, or means of support. Although the impact rule

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\(^7\) Posttraumatic psychoneurosis is used here to designate a functional nervous disease or disorder following an accident, injury, or shock.

\(^8\) Since I. de S. and Wife v. W. de S., 22 Edw. III, f. 99, pl. 60 (1348), courts have protected the individual's right to mental tranquility. However, such protection has been recognized primarily when some other interest of the plaintiff is invaded. The courts have been reluctant to afford such protection in an independent action for mental or emotional harm. See, e.g., Ver Hagen v. Gibbons, 47 Wis. 2d 220, 177 N.W.2d 83 (1970). Problems of proof, the intangible character of the injury, and fictional claims are relevant considerations. Today, however, in light of medical advancements and the higher standards placed on individuals in society to protect others' peace of mind, these justifications have been largely refuted. See, e.g., George v. Jordan Marsh Co., 286 N.E.2d 915 (Mass. 1971). In answer to the possibility of fraudulent claims, the court stated that the advancement of medical science should be sufficient to take care of these problems. Id. at 919. Moreover, there has been a revelation of some of the anomalies in earlier legal theories. For example, courts previously have distinguished intentional from negligent acts because the former were deemed to be more indicative of genuine mental injuries. See, e.g., Moore v. Jefferson Hosp., Inc., 208 Va. 438, 158 S.E.2d 124 (1967). This reasoning seems neither logical nor sound. By simple illustration, suppose plaintiffs A and B suffer identical injuries caused by fright evolving respectively from identical actions of the defendants X and Y. The only distinction in the two cases is that X acted intentionally; Y acted negligently. It hardly seems rational that A be allowed and B disallowed a cause of action merely on the basis of whether the defendant's action was intentional or negligent. "The concern should be with the nature of the plaintiff's injury rather than the nature of the defendant's conduct." Hochman, 'Outrageousness' and Privilege in the Law of Emotional Distress — A Suggestion, 47 CORNELL L.Q. 61, 65 (1961).

\(^9\) 46 W. Va. 48, 32 S.E. 1026 (1899).

\(^10\) Id. at 53, 32 S.E. at 1028.

continued to be enforced, the court did allude to the parasitic tort theory\(^2\) and seemed to imply that proof of even the slightest physical injury would permit recovery.\(^3\) In *Pennington*, the plaintiff's husband, while intoxicated, had thrown several cups at her, but ironically, and perhaps unfortunately in light of the court's decision, the cups missed their mark. Thus, the plaintiff could not present any evidence of physical injury at the trial, and the court was unable to find a "particle of evidence of any actual physical injury"\(^4\) on which to permit recovery for mental suffering.

In a further evolution of the parasitic tort theory, a series of cases arose in which the court did find liability for psychic harm without impact. However, in each of these cases, there existed an already recognized legal injury to which the mental and emotional injury could be attached. For example, recovery was allowed for mental pain and suffering for false arrest and imprisonment,\(^5\) and, likewise, liability was found where a defendant falsely and without grounds swore out a warrant against the plaintiff.\(^6\) The court declared in each of these cases that mental pain and suffering and the insult, indignity, and humiliation inflicted by the wrongful and unlawful acts constituted a just basis for damages.\(^7\) These cases,  

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\(^2\)The parasitic tort theory developed as one of the earliest methods by which mental or emotional damage could create a cause of action. According to this theory, any independent tort, no matter how technical, could be used as the peg upon which to hang the damages and, thus, create a cause of action for such damages. *See*, e.g., Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939).

\(^3\)66 W. Va. at 643, 66 S.E. at 1009. Plaintiff's instruction number four was predicated on two grounds for damages, *i.e.*, injury to the person and injury to the plaintiff's means of support. The court affirmed the lower court's refusal to give this instruction because "*some* physical violence or injury is required" and the plaintiff had failed to show even a "particle of evidence of any actual physical injury." *Id.* at 653-54, 66 S.E. at 1013 (emphasis added).

\(^4\)66 W. Va. 643, 66 S.E. 1009.


\(^7\)There are other instances in which a cause of action has been allowed for mental and emotional injuries due to wrongful or unlawful acts of a defendant. For example, by West Virginia statute, the injury to a father's peace and happiness because of the seduction of his minor daughter creates a cause of action. W. Va. Code Ann. § 55-7-1 (1966). Also, the humiliation and shame caused by insulting words creates a cause of action. *Id.* § 2. Such causes of action also exist where there has been an invasion of one's right to privacy, Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1959); mutilation, mishandling, or improper burial of a dead body, England v. Central Pocahontas Coal Co., 88 W. Va. 575, 104 S.E. 46 (1920); and an improper substance found in food, Webb v. Brown & Williams Tobacco Co., 121 W. Va. 115, 2 S.E.2d 898 (1939) (dead spiny caterpillar found in a plug of tobacco).
however, involved intentional or malicious and wanton torts rather than negligent ones. Therefore, the court was more inclined to find liability if any basis for recovery could be established. The relevance of intentionally caused psychic injury is manifested in a unique way in *Lambert v. Brewster.* The plaintiff sought recovery for mental anguish and distress followed by a miscarriage allegedly caused by fright and nervous shock at witnessing the assault and battery of her father. The court's decision seems to have been based primarily on the theory of "transferred intent." Defendant's intention to commit a battery upon the father was transferred to the plaintiff, allowing the injury to the plaintiff to be classed as intentional. Based on this theory, the court found liability without actual impact, despite the defendant's lack of knowledge of the plaintiff's presence and delicate condition.

Professor Prosser has termed the *Brewster* decision unclear, and other authorities have criticized it as too severe. Nevertheless, several rules in the area of psychic injury were apparently established in this unique case: (1) There may be recovery for physical injuries resulting from nervous shock, even without actual impact; (2) the defendant cannot be excused because he failed to foresee the natural result of his wrongful action if physical harm is directly caused by the plaintiff's fright; and (3) as a matter of public policy, the fundamental theory of common law that for every wrong there should be a remedy must be sanctioned.

*Lambert v. Brewster* was a forward step in the evolution of recovery for mental and emotional torts. Yet, the unparalleled use of the transferred intent theory seems to limit the applicability of *Lambert* and to establish no clear guidelines for future actions based on negligence. *Lambert* leaves several important queries unanswered, *e.g.*, What if the tort were negligent rather than intentional? What constitutes the physical harm for which recovery will be allowed? Thus, when *Monteleone* was presented to the

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97 W. Va. 124, 125 S.E. 244 (1924).

The theory of transferred intent is based on the idea that if the defendant intends to injure A but unforeseeably injures B instead, he is liable to B for an intentional tort. For a discussion of the "transferred intent theory," see Prosser, *Transferred Intent,* 45 Texas L. Rev. 650 (1967).

Prosser, *Insult and Outrage,* 44 Calif. L. Rev. 40, 56 (1956). Prosser also points out that *Brewster* is the only case "which appears ever to have applied to mental distress at the peril of a third person the doctrine of 'transferred intent.'"


Other questions, not within the scope of this note but of great importance to
West Virginia court, judicial precedent was limited to the impact theory, the parasitic tort theory and the exceptional transferred intent theory of Lambert. The question of recovery for negligently caused mental injury had not yet confronted the court.

B. The Monteleone Case

Monteleone v. Co-Operative Transit Co.,23 commonly considered the major case on psychic injury in West Virginia, was decided in 1945. In an action of trespass on the case, Mrs. Monteleone sought to recover from the transit company for posttraumatic psychoneurosis caused by nervous shock. The plaintiff was a passenger in an automobile when one of defendant’s trolley wires fell, shattering the automobile windshield and showering the plaintiff with small slivers of glass. Mrs. Monteleone’s only immediate injury was a slight facial cut. Two weeks later, however, the plaintiff began to suffer severe psychological effects that required medical attention. Mrs. Monteleone brought an action against the defendant on the theory that mental and emotional disturbances which accompany actual physical injury caused by defendant’s negligence are recoverable. The Supreme Court of Appeals reversed the lower court’s decision in favor of the plaintiff and held that there could be no recovery for psychic injury due to nervous shock when no substantial physical injury is claimed and no relationship is shown between the injury caused by the impact and the mental condition for which damages are sought.24

Since Monteleone will be the cornerstone on which to build any theory of recovery for mental and emotional injuries, an in-depth analysis of the court’s decision is necessary to determine the strengths or weaknesses of this foundation. One obvious weakness is that the court’s decision was made almost thirty years ago. If, as the Monteleone court intimated, the common law is to “keep abreast of development and progress,”25 the case must now be viewed in light of subsequent developments in law and medicine. The “embryonic theories” on which the court found no need to comment at that time26 have, in many instances, evolved into prov-
able facts. In addition, even the principle on which the court based its decision now appears untenable and contrary to modern scientific evidence. Now, twenty-nine years later, strict adherence to the principle of recovery set forth in Monteleone may cause the court to overlook sound reasoning more applicable to the particular facts of the case at hand.

For example, in Monteleone, the court limited its decision to the principal theory on which the plaintiff brought her action. The plaintiff contended that the basis of her cause of action would lie within the impact theory, allowing recovery for mental disturbances which accompany or follow actual physical injury. Of the three theories then recognized by the court, this theory was the logical choice and the strongest ground on which the plaintiff could base her cause of action. She had received a physical injury, although slight, from the impact, her mental condition had followed the physical injury, and a number of previous cases had sustained recovery under the "slightest touch" rule. The court concluded, however, that the lack of a causal relationship between the plaintiff's pimple-sized cut and the alleged mental harm was

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27See text accompanying notes 65-74 infra.

28See Green, "Fright" Cases, 27 Ill. L. Rev. 761, 774 (1933), where the author points out that the folly of the "principle controls" theory is the idea that if recovery is allowed in one fright case, it must be allowed in all. He goes on to say that "the merits of the particular case require no such result. There is doubtless as much variability in 'fright' cases as in other sorts of personal injury cases." Unless each case is viewed on its own merits, the "principle controls" folly could, perhaps, be applied to Monteleone and result in the belief that if recovery is disallowed in Monteleone, it must be disallowed in all such cases.

29123 W. Va. 340, 347, 36 S.E.2d 475, 478 (1945). See also text accompanying note 5 supra.

30At the time Monteleone was decided, many courts, fearing fabricated claims, denied recovery altogether in negligence cases where fright or shock, unaccompanied by impact, caused emotional or mental injuries. However, even at that time, use of this doctrine had begun to wane. In states where the doctrine still existed, distinctions began to develop which avoided much of the restrictiveness of the rule. For example, the "slightest touch" rule developed. This rule is discussed in note 31 infra. For a discussion of the ambiguities in the case law of negligently caused mental and emotional injuries, see C. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 89 (1935).

so clearly apparent that, as a matter of law, the defendant could not be held liable. The court reasoned that it was unrealistic and illogical for so slight a physical injury to cause such a severe mental disturbance in a normal individual.\textsuperscript{32}

Because this review represents only one approach to the problem of liability, other approaches may exist which would establish a cause of action. Therefore, the court's decision need not be strictly applied in deciding similar cases. Instead, its conclusion must necessarily be considered in relation with three other important principles which the court did not discuss. First, the "minor contacts" or "slightest touch" theory of impact set out in several cases was the child of administrative expediency, not a product of the liability formula.\textsuperscript{33} It was simply a means of supplying justification for a recovery where no real precedent existed. Second, the right of recovery should rest on the causal connection between the defendant's negligence and the plaintiff's injury. The minuteness, or even the absence, of bodily injury should have little or no importance if the negligence of the defendant is such that it would naturally cause severe emotional injury.\textsuperscript{34} Third, mental pain and suffering can result not only from physical injuries but also from solely emotional experiences, such as fright and shock. The fright or shock is the link in the chain of causation between the negligence and the injury.\textsuperscript{35}

Closer scrutiny of Monteleone reveals another guideline for future litigation of mental and emotional tort actions. More than once the court intimated that, had the plaintiff contended that her nervous condition was in itself a physical injury, a cause of action

\textsuperscript{32}But see Modlin, Psychiatric Reactions to Accidents, 6 Washburn L.J. 317 (1967). The author takes the position that the more serious and disabling the injury, the less likely that there will be psychiatric complications. The reason given is that when there are significant physical damages the patient has something real to cope with instead of something intangible. This operates to neutralize any neurotic symptoms.


\textsuperscript{35}Selzer, Psychological Stress and Legal Concepts of Disease Causation, 56 Cornell L. Rev. 951, 954 (1971).
and possible recovery would have been allowed.\textsuperscript{36} Because the plaintiff had not so contended, the court did not consider her cause of action within the second category allowing recovery, \textit{i.e.}, where there is no injury or impact at the time but a physical injury later results from the nervous shock. The court stated its commitment to this doctrine and went on to explain away the earlier case of \textit{Davis v. Western Union Telegraph Co.} which was not in accordance with this principle, having been decided before the theory of a person's legal right to mental tranquility had been developed to any extent.

The court also discussed at length the case of \textit{Orlo v. Connecticut Co.}\textsuperscript{37} because its facts were more nearly like those in \textit{Monteleone} than those in any other case. \textit{Orlo} was distinguished, however, because in that case there was a physical injury following the shock, while in \textit{Monteleone} there was none. Mr. Orlo's injury consisted of severe fright that caused him to shake and tremble and an aggravation of existing diabetes and arteriosclerosis. However, the injuries suffered by Mrs. Monteleone were as much physically manifested as those suffered by Mr. Orlo. She suffered frequent attacks of violent headaches, often thought the telephone rang when it did not, suffered from constant nervousness, which kept her from doing her work or enjoying any recreation, and was under a physician's care. Medical experts testified that her symptoms were not feigned. Yet, since the symptoms were not of a somatic origin, the court deemed them not physical.

The pervading issue, then, is whether mental and emotional disturbances constitute physical injury?\textsuperscript{38} Today the answer is de-

\textsuperscript{36}128 W. Va. 340, 36 S.E.2d 475 (1945). The court repeatedly emphasized that the "[p]laintiff below [did] not contend that she suffered a physical injury" or that "the nervous shock . . . was a physical injury." Although the court recognized that there could be "a recovery in the absence of impact where the nervous shock is followed by physical injury traceable to it," it noted that "here there [was] none." \textit{Id.} at 347, 349-50, 36 S.E.2d at 478, 479-80.

\textsuperscript{37}128 Conn. 231, 21 A.2d 402 (1941). The plaintiff was a passenger in an automobile that was following a trolley car of the defendant. Due to the trolley car operator's alleged negligence, the car struck the trolley wires, causing them to break and fall upon the auto in which the plaintiff was riding. He continued to sit in the auto with the wires flashing and hissing about it. Plaintiff claimed that he suffered nervous shock and severe fright and that a condition of diabetes and arteriosclerosis was aggravated. The court overruled the lower court's decision for the defendant and held that the injured party is entitled to recover when negligence is proved to be the proximate cause of fright or shock which in turn produces injuries that would be elements of damage had a bodily injury been suffered.

\textsuperscript{38}There are semantic difficulties associated with the word physical. As used in
cedly in the affirmative. A definite nervous disorder can, and often does, have far reaching physical effects on the human body. For example, the West Virginia court, in Lambert v. Brewster,\(^2\) recognized a miscarriage as being such an effect.\(^4\) Many other courts have also recognized that a definite nervous disorder is sufficient physical injury to support an action for damages.\(^1\) The physical injuries caused by the wrecking of the nervous system are often far more serious and lasting than broken bones or torn flesh.\(^2\)

The Monteleone decision left open the door to actions based on the concept of *physical* injuries. Therefore, if a plaintiff, in a case analogous to Monteleone, proves physical injuries, *i.e.*, a definite nervous disorder, a cause of action will lie.\(^3\) The test which

earlier language, its meaning is misleading because mental and emotional aspects of the individual were viewed as separate from the somatic system. The current tendency is to view the human organism as a unit. Therefore, *physical* injuries are no longer limited to purely bodily damage but include emotional and mental damages as well. Goodrich, supra note 34, at 501, contended that "emotion as a purely mental thing does not exist" but "always has a physical side." Thus, he claimed that the judicial language formulated was inaccurate and an admission that emotional and mental states are physical would facilitate the courts' handling of the issue.


\(^3\) Although a miscarriage was one of the earliest physical manifestations of emotional trauma recognized as sufficient to permit recovery, medical science has demonstrated that fright and other solely mental forces do not ordinarily cause miscarriages. For example, in an analysis of one thousand cases of spontaneous abortions, only one could definitely be attributed to traumatic or psychic disturbances. McNiece, supra note 34, at 78 n.259. For a collection of authorities on this question, see Note, Tort Liability for Miscarriage Caused by Fright, 15 U. Chi. L. Rev. 188 (1947).


\(^5\) See United States v. Grant, 418 F.2d 264 (1st Cir. 1969). There the court
has been set forth by a federal district court in Virginia could be the standard in future cases: "[I]t is unreal to attempt to distinguish between mental and physical injury. An affront to either the mental or the physical sensibilities is an affront to the personal being." The question is whether the "'damage' is of substance and sufficiently identifiable in the person of the claimant." 44

Although the Monteleone court's concern for throwing wide open the door to subjective symptoms of mental injury was once a valid objection to the plaintiff's claim, this contention is of questionable validity today. However, several difficulties are still present: (1) Distinguishing the valid claims from the false; (2) separating serious mental disorders from trifling isolated emotional upsets; and (3) determining the amount of damage if such an injury exists. The advancements of medical science should help alleviate most of these problems.

Many areas of uncertainty in the causes and symptoms of psychic injury now have been clarified. 45 Moreover, the possibility of feigned suffering and speculation has never been a problem particularly indigenous to damages without impact. The possibility exists in any personal injury claim where medical evidence must be weighed, yet, the courts have allowed the jury to use their sound judgment in determining the validity of a plaintiff's claim. 46

The statement of the West Virginia Supreme Court of Appeals, in Lambert v. Brewster, summarizes the best approach to this public policy issue:

While it may be that injuries resulting from fright are readily simulated and the avenue for fraud is thus left open to more easy approach, the most that we can say is that if the injury suffered is traced proximately through the fright to defendant's

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44 Id. at 269.


46 See text accompanying notes 65-74 infra.;


The damages [sic] from suffering, either mental or physical, cannot be weighed; it cannot be measured; it cannot be computed. It can only be estimated. The difficulty in making the estimation affords no good reason for failure to make it. . . . The estimation must depend upon the good sense, sound judgment, and enlightened conscience of the jury, under all the facts and circumstances of the particular case, and the sensibilities of the particular person.
wrong, the matter of sifting the true from the untrue in the proof is more properly addressed to the good sense of our juries than to this court."

III. Medico-Legal Problems Inherent in Recovery for Mental and Emotional Injury

Before developing possible theories which are consonant with modern medical thought for mental and emotional injury cases, it is necessary to discuss the inevitable medico-legal problems which confront the courts and lawyers in these cases. The first question that arises is that which faced the court in Monteleone—what is the legal definition of "physical harm"? In United States v. Grant, the First Circuit defined "physical" as a "condition or illness... susceptible of objective determination." In that case, a definite nervous disorder was held sufficient to support an action for damages caused by negligence. A problem arises, however, in determining exactly what constitutes a definite nervous disorder. The definition must necessarily exclude such symptomatic emotional harms as mere upset, dismay, grief, hurt feelings, and anger, for if mere negligence could result in liability for minor psychological harms, an unrealistic duty of care would be imposed on all possible defendants. This danger can be avoided, however, if proof of actual deleterious effects on the plaintiff's health is made a prerequisite to recovery. The burden of proof would necessarily rest on the plaintiff to show that his injuries were of a serious and definite nature rather than isolated mental anguish. Overall, the emphasis should lie not on whether the injuries are physical but on whether or not there are injuries as a direct result of defendant's negligence. The reason for this emphasis is that severe mental and

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97 W. Va. 124, 138, 125 S.E. 244, 249 (1924).
418 F.2d 264, 269 (1st Cir. 1969).
See Editor's Comment, Traumatic Neurosis: A Common Problem, 2 LAWYER'S Med. J. no. 2, at 174-75 (Aug. 1973). The editor suggests several factors to be considered by the plaintiff's lawyer when establishing the proof necessary to show a definite nervous disorder: (1) The extent and adequacy of study and treatment of the plaintiff by the medical expert is relevant in determining the validity, seriousness, and prognosis of plaintiff's injuries. (2) Since the credibility of the plaintiff's claim is significantly grounded upon behavior patterns, proof of changes in personality, social habits, working habits, and general adjustment to the world around him is important. (3) Where an organic basis exists for the traumatic neurosis, e.g., brain damage, proof should clarify all aspects of the relationship. (4) The medical witness should pinpoint the specific type of neurosis, the criteria used in making his diagnosis, and the logical sequence of symptoms in the plaintiff's illness.
emotional injury is tantamount to physical injury. Both result in illness or sickness which, depending on the severity, can debilitate, deteriorate, or totally disable the human body.\footnote{The following query can illustrate the principle that the orderly functions of man's mind and emotions are as vital to his efficient operation as his legs, arms, eyes, or ears: Which is more injurious to man, a sound mind in a disabled body or an unsound mind in an able body?}

Second, the question arises, as in Davis v. Western Union Telegraph Co.,\footnote{46 W. Va. 48, 32 S.E. 1026 (1899).} whether psychic injuries are too vague and subjective in nature to be the subject of a claim for damages. Although many types of physiological and functional changes may follow crisis or shock,\footnote{Effects of emotional shock can be classified under two main categories: Psychosomatic disorders, which are manifested by organic, bodily symptoms, and psychoneurotic disorders, which are manifested by purely psychological symptoms. For an explanation and further sub-classification of these disorders following shock or crisis, see L. Keiser, The Traumatic Neurosis ch. 5 (1968). See also Havard, Reasonable Foresight of Nervous Shock, 19 MOD. L. REV. 478 (1956).} development in medical technology has made it increasingly easier to establish and prove the direct manifestations of psychological injuries. Expert medical testimony should be sufficient to dispell any questions as to the genuineness of the plaintiff's claim. Several problems are inherent in the use of expert testimony.\footnote{McNiece, Psychic Injury and Tort Liability in New York, 24 ST. JOHN'S L. REV. 1, 73 (1949).} There is a "shadow-land" area of psychic injury where the experts themselves disagree. Terminology is not uniform throughout the medical profession, much less among laymen, and this tends to further complicate the diagnosis of the particular symptoms.\footnote{Laughlin, Neurosis Following Trauma, in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 85 (P. Cantor ed. 1962).} Since the symptoms of psychic injury vary widely and are often non-specific, objective criteria for determining injuries are lacking.\footnote{See also Negligence and the Infliction of Emotional Harm, supra note 34, at 517.} Still, these problems are not insurmountable.\footnote{See PSYCHIC TRAUMA 37 (S. Furst ed. 1967): The crucial variable is intensity—i.e., whether or not the stimulus, or the combination of stimuli, is strong enough to pierce the stimulus barrier. The intensity of the stimulus, however, cannot be measured by any single method.} If the
physical effect of the strong psychological disturbance is a result that can be traced and seen, the plaintiff should have an unequivocal right to recover. 37

However, given the fact that the plaintiff's injuries are genuine, another problem of proof exists which is threefold. First, there is the argument that the defendant's negligence merely precipitated an already existing tendency toward such an illness. 38 Even in the community of psychologists, there is a group that specifically stresses this "pre-traumatic personality" 39 as the key to the problem, while disregarding the stimulating force. However, other psychologists disagree with this theory and emphasize the stimulating force instead. The critical question, then, on the legal level, might be whether the illness would have appeared in time, even

criterion. Rather, its traumatic potential will depend on a number of factors, including constitutional predisposition, the state of the psychic apparatus, and the relatedness or lack of relatedness of the stimulus itself to prevailing drive-cathected wishes and conflicts. Thus, a given stimulus may be traumatic for one individual but not for another; further, for a given individual, a stimulus that is traumatic at one time may be assimilated without being overwhelming at another.

37 See Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W. 2d 312 (1963). In that case the court stated, "[W]e now possess the tools whereby we can intelligently evaluate claims of emotional injury. Psychiatry and clinical psychology, while not exact sciences, can provide sufficiently reliable information . . . to enable a trier of fact to make intelligent evidentiary judgments on a plaintiff's claim." Id. at 359, 124 N.W. 2d at 317.


39 According to Furst, these tendencies, which he calls preconditions of trauma, fall roughly into three categories: (1) Constitutional factors which include "abnormally strong or deviant instinctual endowment" and "innate ego weakness"; (2) effects of past experience which serve to compromise or strengthen the ego capacities; and (3) the psychic state prevailing at the time the traumatic stimulus is perceived. Psychic Trauma 38 (S. Furst ed. 1967).

40 L. Keiser, supra note 52, at 22. See also Usdin, supra note 42, at 237, where the author states that triggered neuroses constitute the majority of psychic injury cases. He likens an individual's personality to an iceberg, seven eighths below the surface and one-eighth above. He further explains:

An appropriate assessment of the importance of the precipitating event can be made only if the individual's entire personality structure is carefully studied and special evaluation is made of his other problems. . . . In neurosis triggered by trauma, the history may appear to date from the injury but this usually is an artifact that provides the patient with an acceptable excuse for his numerous problems in life.

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without the precipitating event. Assuming that a definite "yes" could be given, the answer should not be of great consequence for two reasons. First, if this premise were true, then the same logic could be extended to justify even negligently caused death by saying that the decedent would have died eventually anyway. Second, there is a distinction between the standard of liability and the extent of recovery. 60 If there is proof that defendant's negligence would cause a substantial risk of emotional injury to a normal person, the defendant is liable. His lack of knowledge of the extent of possible damage to the plaintiff is no defense. The "thin skull rule" 61 applies, requiring that the defendant take his victim as he finds him.

This leads to the second part of the three-fold problem—the difficulty in ascertaining the normal person or the normal reaction to such stimuli as shock and fear. 62 Admittedly, there is no statistical compilation of data showing how people react and the degree of emotional harm resulting from specific stimuli. But, neither are there any such statistics for determining the "reasonably prudent man." Thus, as with the reasonably prudent man test, the judgment of normalcy should rest in the common sense and sound estimation of the jury, having weighed the particular facts of the case.

The jury itself is the third part of the threefold problem. The average juror often has difficulty in grasping the concept that physical maladies actually can result from mental and emotional

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60 Negligence and the Infliction of Emotional Harm, supra note 34, at 518. The following hypothetical is used to emphasize the distinction between the standard of liability and the extent of recovery: D smashes P's car. One inquires whether P is hurt, not whether P was thrown through the windshield, flipped three times in the air, and landed on his head. Analogously, in an emotional injury case, the standard of liability is determined by whether injury was likely, not by whether the victim's specific reactions were likely. Once liability is found, the extent of plaintiff's recovery is measured proportionately by the extent of his injuries.

61 The "thin skull rule" is derived from a reference by Kennedy, J., in Dulieu v. White & Sons, 2 K.B. 669, 679 (1901), one of the earliest shock cases. Judge Kennedy emphasized that once the defendant's negligence which caused the injury is established, then the defendant is liable for the whole damage. "[I]t is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart." Accord, Harris v. Norfolk So. Ry., 319 F.2d 493 (4th Cir. 1963).

62 1 Traumatic Medicine and Surgery for the Attorney 2 (1962). Not only is there no positive definition of health but, also, the term normalcy is a misnomer. There is no definite standard of normalcy since what is normal for one individual is not necessarily normal for another and may even be abnormal.
trauma or that definite psychic disorders are physical in nature. Unless there has been some kind of bodily impact, the juror is apt to view the plaintiff as a malingeringer. This is partially attributable to historical misconceptions surrounding psychic injury. 63 Until fairly recently, medical scholars believed that all mental and emotional ills were traceable to physical problems. The impact rule is a reflection of this theory in our case law. Medical science has since proved the fallacy of this concept. 64 Nevertheless, the lawyer is faced with making credible to the jury the plaintiff's claim of mental and emotional injury. To a great extent, this can be done by providing the jury with the testimony of medical experts who use terminology that the jurors can understand.

Even with competent medical experts as witnesses, the lawyer is faced with still another critical and controversial issue—the validity of psychological evaluations as to the extent, duration, and prognosis of the mental or emotional injury. 65 The evaluation and assessment of claims for such damages are seldom a simple matter. Psychological tests are, indeed, some of the most subjective of all medicine's diagnostic tools. Measurement of impairment is often indirect and vicarious since it deals with manifest results of a mental and emotional basis. Additionally, the many theories advanced to explain actions, emotions, and behavior of individuals and the disagreements among psychiatrists tend to minimize the value of psychiatric testimony. 66 A determination of the degree of liability and a fair estimation of the extent of damage in mental and emotional injury litigation "can well tax the judgment of a twentieth century Solomon." 67

However, a diagnosis of posttraumatic neurosis can be made with reasonable medical certainty. Although psychiatric findings

63 For a summary of the historical development of psychic injuries, see L. Keiser, supra note 52, at 12; 6 Traumatic Medicine and Surgery for the Attorney 87 (P. Cantor ed. 1962).
64 See text accompanying notes 65-74 infra.
65 In a recent study of 321 cases of posttraumatic neurosis three years after litigation was settled, 67 of the 321 still had some form of neurosis. Only one had made a complete recovery. Of the 66 who had not completely recovered, one-third had shown improvement and returned to work, but their earnings were down over 40%; one-third had shown no improvement but returned to work. Their earnings were down 60%. The other one-third had not returned to work. Dearman, Neurosis as the Result of Trauma, in 3 Lawyers' Medical Cyclopedia 210 (C. Frankel ed. 1970).
67 Laughlin, supra note 54, at 82.
may not be altogether tangible in nature, "they are just as objective, if not more so, than many material findings in physical illness." The psychologist conducts certain quantitative tests on the patient which have been standardized by using thousands of known cases. Thus, objective interpretations are possible by comparing the patient's responses to the typical responses of many other persons previously tested. In addition, the psychologist makes qualitative appraisals of the patient in interviews. By studying the patient's history, both medical and social, the psychologist can determine the severity of such impairments by measuring the amount of the patient's regression.

The ultimate concern is to determine whether the patient has received a permanent impairment in terms of loss of physiological, psychological, personal, or social adjustment. Many changes, both physiological and functional, can occur as a result of trauma. Some are only temporary, functional changes. However,

6Dearman, supra note 65, at 207.


7The psychological examination includes three basic techniques: (1) Psychometric tests, e.g., Minnesota Multiphasic Personality Inventory (MMPI); (2) standardized behavior samples, e.g., thematic apperception (subject perception and interpretation) procedures, object-sorting tests, "draw-a-figure" tasks; and (3) special techniques of clinical interviewing, such as interviewing in order to elicit clues as to significant aspects of personality, intellectual function, attitudes, and motives.

8A distinction is made between permanent impairment, which is a purely medical condition, and permanent disability, which is not purely medical but involves a determination by a trier of facts. The physician determines whether the patient has suffered an automatic or functional abnormality that is stable even after maximum rehabilitation has been achieved (permanent impairment). By weighing this impairment with other factors, the trier of facts, on the other hand, determines whether the person's actual or presumed ability to engage in gainful activity is reduced or absent, with no marked change expected to occur in the future (permanent disability). 198 Journal of the Am. Med. Ass'n 146 (1966). For a detailed examination of criteria for evaluating permanent impairment due to neurosis on a percentage scale, see W. Curran & E. Shapiro, Law, Medicine and Forensic Science 145 (2d ed. 1970). The authors describe three general classes: Class 1—Impairment of Whole Man—0%-5%; Class 2—Impairment of Whole Man—10%-45%; Class 3—Impairment of Whole Man—50%-95%.

9Various changes include (1) anxiety; (2) gastrointestinal symptoms, e.g., anorexia (diminished appetite or aversion to food), nausea, weight loss; (3) cardiovascular symptoms, e.g., palpitation, precordial distress, increased perspiration; (4) genitourinary, e.g., frequency, urgency; (5) emotional fatigue; (6) weakness; (7) headaches; (8) backaches.
when these persist, they become chronic and can ultimately result in “fixed structural change and irreversible organic pathology.”

Others are measurable by laboratory studies, e.g., acceleration of blood clotting time and increase in blood viscosity. The permanency of impairment depends, to a large degree, on whether the patient is treatable. Even if he is, treatment is expensive, often takes a long time, and is a difficult, complex joint endeavor between patient and physician.

The overriding problem which pervades psychic injury litigation is the lack of understanding of mental and emotional injuries. The ultimate solution to this problem can only be by way of public education.

IV. THEORIES IN SUPPORT OF AN INDEPENDENT CAUSE OF ACTION FOR MENTAL AND EMOTIONAL INJURIES

Before discussing the mechanics of particular theories which would support an independent cause of action for psychic injuries, several factors that are indispensable in forming any such theory must be recognized. Two of these, medical advancements and prior case law, have been discussed previously. Some attention also must be given to administrative feasibility and socio-economic factors, which are important for several reasons. First, any theory must be capable of adequate administration by the courts. In the area of psychic injuries, the question arises as to whether the law has progressed on a parallel plane with scientific development. The law must not, in its desire to be forward looking, outrun scientific standards and create liability where no adequate criteria of proof is available. Such a step would make the administration of any remedy infeasible. Also, there is the problem of setting some kind of limit on liability for negligently inflicted mental and emotional injury. Unless limits are set, courts will find administration of the law extremely difficult. Moreover, it would be an entirely unrealistic burden if every man were to be held liable for all emotional damages in some way caused by his negligence, however slight.

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"Id.

"Amaya v. Home Ice, Fuel and Supply Co., 59 Cal. 2d 295, 312, 379 P.2d 513, 523, 29 Cal. Rptr. 33, 43 (1963). The California court summarized this problem as follows: "[W]e are left with the question of whether in this area of inquiry where emotions play so large a role the law has now become sufficiently responsive to scientific reality to redress the 'net balance of justice.' ""
Therefore, any theory must weigh the magnitude of the plaintiff's risks with social practicability and disallow compensation to the individual plaintiff if it would create injustices to society as a whole.

Recent case law and authorities in the field have created several theories which take these factors into consideration in supporting an independent cause of action for traumatic injuries. Although negligence is basic to all of these theories, they will be classified for purposes of clarification into four categories: (1) The pure negligence theory; (2) the theory of natural, proximate cause; (3) the duty-foreseeability theory; and (4) the balancing theory. In any negligence theory, the plaintiff first has the burden of proving that the defendant was negligent. However, the question remains as to how negligence is to be determined. The suggested answers to this question form the basis for the four classifications of theories which are set out below.

Under the pure negligence approach, the defendant would be held negligent only if his actions created "a substantial and unreasonable risk of emotional harm to a normal person in the plaintiff's position." This approach requires an understanding of the meaning of both "emotional harm" and "normal person" because the legal definitions of these two terms inevitably determine the scope of liability. "Emotional harm," in this context, is "any" mental distress serious enough to require medical attention. The purpose behind this definition is to arrive at a middle ground which would allow establishment of threshold torts and, yet, exclude such damages as mere upset, dismay, humiliation, grief, or anger, which would place an unrealistic duty of care on defendants. The definition of the "normal person" would be determined primarily by the

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76 Except for the pure negligence theory, which was discussed in Negligence and the Infliction of Emotional Harm, supra note 34, these theories were not specifically cited in any single source. They developed logically from the cases and sources used in researching this topic. Sources primarily relied on include: Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922); Green, "Fright" Cases, 27 Ill. L. Rev. 761 (1933); Havard, Reasonable Foresight of Nervous Shock, 19 Mod. L. Rev. 478 (1956); Hochman, 'Outrageousness' and Privilege in the Law of Emotional Distress—A Suggestion, 47 Cornell L.Q. 61 (1961); McNiece, Psychic Injury and Tort Liability in New York, 24 St. John's L. Rev. 1 (1949); Throckmorton, Damages for Fright, 34 Harv. L. Rev. 280 (1921).

77 Negligence and the Infliction of Emotional Harm, supra note 34, at 516.

78 Id. at 517.

79 Id. at 517 n.25. "Threshold tort' here refers to the minimum requirements for establishing a defendant's liability."
common sense and sound estimation of the jury aided by expert medical testimony explaining what the probable reactions of a normal person would be. These standards of emotional harm and normality would help solve the problem of setting some limitation on liability. In addition, they would provide functional guidelines by which the jury could measure the risk involved. However, this theory presents several problems. Proof is more complicated since emotional harm is such a fluid concept. Not only is there no real consensus as to what constitutes emotional harm, unlike physical harm, but also, normality is more difficult to define in emotional than in physical terms. The discretion of the jury is much greater. However, if courts formulate instructions emphasizing and explaining the concepts of emotional harm, risk, and normality, this discretion can be restricted. Courts are gradually moving toward this theory which represents only a slight break with past law but may produce changes that are "practically and theoretically desirable."89

Under the duty-foreseeability theory, the ultimate issue is whether a duty to use due care exists. This duty is found whenever it is foreseeable that harm may result if the duty is not exercised. Thus, foreseeability of harm becomes the test for the existence of actionable negligence. This does not mean that the specific injury must be foreseen. Instead, the test is whether some harm or harm of a general nature is foreseeable. However, the type of injury is relevant to the extent that it must be definite in character and adequately supported by proof and medical testimony. It also can be relevant in determining whether the harm is primarily the result of the plaintiff's unusual sensitivity and susceptibility to psychological injury. If this is the case, the defendant would not be liable if no harm could have been reasonably anticipated.

The theory of natural, proximate cause is more liberal since the emphasis rests not on foreseeability but on whether there is a causal relation between defendant's negligence and plaintiff's injury. Under this theory, the particular idiosyncrasies of the plaintiff would tend to have no effect on the determination of liability.81 Thus, the proof required by the plaintiff would be only twofold—the commission of the wrongful act and the chain of unbro-

89Id. at 528. See app. I infra.
81However, some authorities believe that particular idiosyncrasies of the plaintiff should have an effect on the amount of recovery, and, therefore, would reduce the amount of damages in proportion to the peculiar susceptibilities of the plaintiff. E.g., McNiece, supra note 53, at 71.
Dressler: Torts—Expanding the Concept of Recovery for Mental and Emotional Injuries

The balancing theory is actually a combination of the first three theories in that there must be proof that the defendant was negligent, that such negligence was the proximate cause of the plaintiff's injuries, and that some harm was reasonably foreseeable. However, this theory stresses one additional consideration. Emphasis is placed on weighing the gravity of the defendant's negligence against the severity of the plaintiff's injury. If the nature of the defendant's negligence would likely cause psychic injury and the plaintiff's injuries are not so trivial as to place an unrealistic burden of duty on the general public, then liability ensues.

V. Conclusion

Although these negligence theories have yet to be applied by the West Virginia court in psychic injury cases, prior case law does not preclude their adoption. Prior West Virginia case law reveals a continual evolution in the development of the mental and emotional tort from no cause of action in Davis to the unique "transferred intent" theory of Lambert. The Monteleone decision, which at first glance would seem to prevent these new approaches, does not impede this progression. The pure negligence theories, of which the court took cognizance but deemed merely embryonic, are used today with increasing frequency. In addition, the second category of recovery recognized by the court—no injury or impact at the time but a physical injury afterward—can be applied in a much broader sense today. Recent developments in medical science indicate that a definite emotional or mental injury does constitute the physical injury required in Monteleone. Moreover, medical advancements have dispelled many of the earlier fears concerning inadequate proof and fabricated injuries. Although some problems still exist, they are not of such magnitude as to prevent the court from recognizing an independent cause of action for negligently caused mental and emotional injuries.

The theories set forth in this note are not only interrelated but also represent merely slight variations of the same ultimate principle—that an independent cause of action for mental and emotional injuries should exist with recovery based on the facts and proof of

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*See text accompanying note 4 supra. See also app. I. infra.
*See text accompanying notes 65-74 supra.
each case. If the plaintiff shows that (1) the defendant was negligent; (2) the negligence was the proximate cause of plaintiff's injuries; (3) the injuries suffered by the plaintiff were established by medical testimony as being genuine; and (4) the defendant could reasonably have foreseen that his negligence would cause harm, then the defendant should be held liable. In short, an action to recover for mental and emotional damages resulting from trauma should be treated the same as any other tort action for personal injuries. The difficult cases must be entrusted to the quality and genuineness of proof, the contemporary sophistication of medical technology, the wisdom of the courts, and the ability of the jury to discern the dishonest from the honest claim. To allow an independent cause of action for such injuries, rather than to require the action to be tacked on to some other kind of existing claim, is a step toward making the law answerable to wrongs that should not go unrighted. As one author aptly expressed almost a half century ago:

The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law.

Jean Karen Dressler

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1 T. STREET, THE FOUNDATION OF LEGAL LIABILITY 470 (1906).
APPENDIX

SURVEY OF CASE LAW IN STATES RECOGNIZING A CAUSE OF ACTION FOR NEGLIGENTLY INFlicted MENTAL AND EMOTIONAL INJURIES WITH PHYSICAL MANIFESTATIONS

This survey deals primarily with solely negligent infliction of mental and emotional harm. Neither intentional infliction of such harm, generally recognized in all states, nor parasitic tort actions are covered.

The cases cited primarily exemplify one or more of four basic principles: (1) Severe shock to the nervous system constitutes physical injury; (2) mental and emotional damages are sufficient to create a cause of action; (3) a cause of action lies if the negligence is the proximate cause of the fright or shock; and (4) a cause of action lies if the damage is foreseeable.

Those cases marked with an asterisk have extended recovery for mental and emotional injuries sustained to bystanders who witness the negligent injury of third persons.

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<td></td>
<td>Dillon v. Legg, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).*</td>
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<td>Vanoi v. Western Airlines, 56 Cal. Rptr. 115, 247 A.2d 793 (1967).</td>
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<td>5. Florida</td>
<td>Stewart v. Gilliam, 271 So. 2d 466 (Fla. 1972) (injury was myocardial infarction).</td>
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6. Georgia

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11. Maine

12. Maryland
Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).
Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933).

13. Massachusetts
Petition of United States, 418 F.2d 264 (1st Cir. 1969).

14. Michigan

15. Minnesota

16. Mississippi
Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481 (Miss. 1972) (defendant must have acted maliciously, intentionally, or with gross carelessness).


17. Missouri
Warren v. Parrish, 436 S.W.2d 670 (Mo. 1969) (defendant’s action must have been outrageous or extreme).

18. Montana
Kelly v. Lowney & Williams, 113 Mont. 385, 126 P.2d 486 (1942).

19. Nebraska

20. Nevada

21. New Hampshire


22. New Jersey

23. New York


24. N. Carolina


25. N. Dakota

26. Ohio
27. Oklahoma
Belt v. St. Louis-San Francisco Ry., 195 F.2d 241 (10th Cir. 1952) (shock defined as the result of injury and its effect on the brain).

28. Oregon

29. Pennsylvania

30. R.I.
Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907) (fright gives rise to nervous disturbances and those in turn to physical troubles).

31. S. Carolina

32. Tennessee

33. Vermont

34. Virginia

35. Wisconsin
Redepenning v. Dore, 56 Wis. 2d 129, 201 N.W.2d 580 (1972).
Ver Hagen v. Gibbons, 47 Wis. 2d 220, 177 N.W.2d 83 (1970).
Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1965).