Denver Law Review

Volume 40 | Issue 4 Article 3

January 1963

A Legal Dilemma - Injury Caused by Psychic Stimuli

Sam W. Losli

A Legal Dilemma - Injury Caused by Psychic Stimuli

A LEGAL DILEMMA – INJURY CAUSED BY PSYCHIC STIMULI

By SAM W. LOSLI*

This paper was awarded the 1963 Omar E. Garwood Memorial Prize of $100 in a competition sponsored by the Association of Colorado Claimants' Attorneys.

I. INTRODUCTION

> . . . Our philosophy will tell us the proper function of law in telling us the ends that law should endeavor to attain; but closely related to such a study is the inquiry whether law, as it has developed in this subject or in that, does in truth fulfill its function—is functioning well or ill . . . .[1]

Laymen criticize the common law system as antiquated, obsolete, stagnate, and even unjust. In these days of ever changing methods and ideas, phenomenally rapid increase in knowledge in fields of science and medicine, society often grows impatient with the slow moving common law and seeks more rapid changes in legislatures of our country. Modern society is critical of anything with its roots in the middle ages.[2]

Those who deal with the common law in their professions defend the system's slow change as being more certain, resting on precedent after precedent like building a very strong and trustworthy castle. No attempt will be made here to defend or criticize the common law system. Consideration will be limited to one small, slow-moving area of our present day law that has been open to just criticism by laymen and lawyer alike, viz., injury caused by psychic stimuli.

Failure to move, to keep up with advances in science and medicine, and even society itself, is not the sole basis for criticism in this field of law, however. Another is the ugly stones of precedent used in making a very unattractive castle.

Some courts were early in recognizing the mistaken premises on which the earliest decisions refused damages for injury caused by psychic stimuli, and others followed their lead, defending themselves by pointing out the broad statements and illogical conclusions which make bad law. Finally, in 1961, the strongest of all precedent against awarding damages for injury caused by fright was replaced. New York's *Mitchell v. Rochester Ry.*[3] fell and in its place *Batalla v. State*[4] stands as a monument of the changing thought in this confused field of law.[5]

New York is not the only state that has changed views on this subject. The *Mitchell* case has been singled out only because of its strong position for so many years, and because lawyers and professors of law throughout the United States have used it as the

* June graduate, University of Denver College of Law.
1 Cardozo, The Growth of the Law 112 (1924).
2 Pound, The Future of American Law, in Legal Methods and System, 97 (1950).
3 151 N.Y. 107, 45 N.E. 354 (1896).
4 10 N.Y.2d 237, 176 N.E.2d 729 (1961).
5 McCormick, Damages, 319-320 (1935).

leading case for the rule of no award for injury caused by fright, unaccompanied by bodily contact. By the time the *Mitchell* case was overruled, however, it had become a light for a dwindling minority.[6]

II. HISTORICAL DEVELOPMENT

> The more we study law in its making, at least in its present stages of development, the more we gain the sense of a gradual striving toward an end, shaped by a logic which, eschewing the quest for certainty, must be satisfied if its conclusions are rooted in the probable.[7]

Before 1880, the American courts had had few if any cases before them presenting the question of injury by fright. This action, historically, is based on allowance of redress for assault as a form of trespass in early English law. "A, with the apparent means and intention to commit a battery indulges willful conduct toward B or a third person arousing in him a reasonable apprehension that the threatened harmful or offensive touching will be carried forthwith into impact. A is liable to B in damages for his assault."[8]

It is said that this earliest protection dedicated to mental tranquility seemingly "was to prevent assaults and consequently breaches of the peace and did not represent judicial solicitude for the psychic."[9]

As we review the development of this cause of action in England and the United States, it should be noted that injury caused by psychic stimuli or fear is so closely related to mental anguish situations that courts often confuse and relate the two. It does not seem to be a great error, for injury caused by psychic stimuli is but one step beyond mental distress—the injury being the product of severe mental distress. However, fright may at times cause a direct physical injury because of a faint or panic, but these actions are in turn related to severe mental distress.[10]

The first case of record involving mental anguish related to this subject arose through an action for mental anguish and other damages, caused when the defendant seduced the plaintiff's daughter. The court granted plaintiff's right to sue for these damages.[11] In *Irwin v. Dearman,* mentioned in *Flemington v. Smithers,*[12] the court limited damages for parents' mental distress caused by injury to their child to situations where such damages arose from seduction of their children. This is still the general rule, although courts are beginning to realize that damages for injury caused to parents because of fear for their children should be given in some situations.[13]

The next important case arose through a complaint of slander. This is the celebrated case of *Alsop v. Alsop.*[14] The plaintiff claimed

6 Burke, J. in Batalla v. State, *supra* note 4, said " . . . it is well to note that it [The Mitchell case doctrine] has been thoroughly repudiated by the English Courts which initiated it, rejected by a majority of American jurisdictions, abandoned by many which originally adopted it, and diluted, through numerous exceptions, in the minority which retained it." See also, 13 Syracuse L. Rev. 176 (1961).

7 *Supra* note 1 at 70.

8 Smith, *Relations of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 Va. L. Rev. 193 (1944).

9 *Ibid.*

10 See 64 A.L.R.2d 103, 104 (1959).

11 Chambers v. Irwin, 2 Selw, N.P. 1100 (1800).

12 2 Car. & P. 292, 172 Eng. Rep. 131 (K.B. 1826).

13 "The law appears to be moving in the direction of liability but thus far it clearly is limited to the most extreme cases of violent attack, where there is an especial likelihood of fright or shock, usually on the part of a woman." Prosser, Torts, 47 (2d ed. 1955).

14 5 H & N 534, 175 Eng. Rep. 1292 (Ex. 1860).

that the defendant had falsely charged her with inconstancy and when these reports, made to third persons, came to her attention, she suffered nervous shock and mental illness severe enough to require medical care. The Exchequer ruled there was no cause of action because there was no legal precedent for such damages. If the court would recognize sickness for special damage, this would broaden liability for slander and make free speech more perilous, lay a foundation for a new and novel claim, and besides, said the court, illness for slander is not a natural consequence of defamation and thus too remote.[15]

In 1888, the case of *Victorian R. Comm'r v. Coultas*[16] reached the Privy Council, and was decided on the narrow point of injury caused by fright produced by defendant's negligence. The case arose in Canada, and the facts as stated are of some import. Coultas and his sister, driving a horse and buggy, approached defendant's tracks. The gatekeeper, an employee of defendant, allowed them to cross over but a train was rapidly approaching. Upon seeing the train the gatekeeper shouted for them to go back but Coultas directed the gatekeeper to open the gate on the other side, which he did, and Coultas got the buggy across the tracks just as the train went by, narrowly missing the Coultas buggy. The sister suffered such fright she became ill and sued the defendant for injuries occasioned by this fright.

The Council, after considering the impossibility of such injury caused by nervous shock arising from and as a consequence of the gatekeeper's negligence and after finding no precedent for the action stated that the difficulty which so often exists in cases of alleged physical injuries of determining whether they were caused by the negligent act, would be greatly increased, and a wide field open for imaginary claims.[17] Thus, this leading case was decided mainly on the point of public policy.

It was upon the *Coultas* decision that New York based its own conclusions in deciding *Mitchell v. Rochester Ry., supra.* In this leading American case, the defendant's employee drove a streetcar so negligently, that the horses drawing the car almost ran down the plaintiff, finally stopping on either side of her, and frightening her so badly she subsequently had a miscarriage. Plaintiff sued for damages based on her injury caused by fright alone. The court held

15 *Supra,* note 8 at 195.
16 13 App. Cas. 222, 57 L. J. P. C. 69 (P.C. 1888).
17 *Supra,* note 8 at 197.

that public policy, the "flood of litigation" theory, precluded an action based solely on fright. The fear of feigned injury appears to have been the final determining factor.[18]

English law veered quickly away from the *Coultas* case rule, but it was too late in the United States. The corner stone had been placed and the building was being built upon it as quickly as fact situations allowed.[19] However, in 1890, the highest court of Texas listened to argument concerning another miscarriage. The case of *Hill v. Kimball*[20] was decided against the defendant, and the court expressly rejected the *Mitchell* doctrine, initiating the rule that has become the majority rule today.[21] The plaintiff alleged that the defendant, who knew of her advanced pregnancy and delicate health, came into her yard and violently assaulted two Negroes, using profane language and drawing blood. As a result of his actions, plaintiff became frightened and suffered a miscarriage.

The court said that although there was no legal precedent, it was not a sufficient reason for denying recovery, and that there could be no doubt that a physical injury might be produced through a strong emotion of the mind; the fact that it was more difficult to produce such an injury through mental operations than by direct physical means afforded no sufficient ground for refusing compensation where the injury was intentionally inflicted.

---

18 *Supra*, note 3.

19 Courts originally or still following the New York Rule: U.S. (There is some question) Chicago, B. & Q. R. R. v. Gelvin, 238 Fed. 14 (8th Cir. 1916); *But see* Kaufman v. Western Union Tel., 224 F.2d 723 (5th Cir. 1955), *cert. denied* 350 U.S. 947.
Ark. St. Louis I.M. & S. R. R. v. Bragg, 69 Ark. 402, 64 S.W. 226, 86 Am. St. Rep. 206 (1901);
Ill. Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898);
Ind. Boston v. Chesapeake & O.R.R., 223 Ind. 425, 61 N.E.2d 326 (1945);
Ken. Kentucky Traction & Terminal Co. v. Roman, 232 Ky. 285, 23 S.W.2d 272 (1929);
Me. Herrick v. Evening Exp. Pub. Co., 120 Me. 138, 113 Atl. 16;
Mass. Spade v. Lynn & B.R.R., 168 Mass. 285. 47 N.E. 88 (1897);
Mich. Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923);
Mo. Trigg v. St. Louis, K.C. & N.R.R., 74 Mo. 147 (1881);
N.J. Ward v. West Jersey & S.R.R., 65 N.J.L. 383, 47 Atl. 561 (1900); Greenberg v. Stanley, 51 N.J. Super. 90, 143 A.2d 588 (1958);
Ohio Miller v. Baltimore & O.S.W.R.R., 78 Ohio 309, 85 N.E. 499 (1908);
Penn. Potere v. Philadelphia, 380 Pa. 581, 112 A.2d 100 (1955);
Va. Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932);
Wash. Stiles v. Pantages Theatre Co., 152 Wash. 626, 276 Pac. 112 (1929);
NOTE: Some of the above states do not follow the same rule in cases of willful wrong. See 64 A.L.R.2d 134.

20 76 Tex. Civ. App. 210, 13 S.W. 59 (1890).

21 Cases following Majority Rule are:
U.S. See footnote 19, *supra;*
Ala. Alabama F. & I. Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916);
Calif. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952);
Conn. Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292 (1952);
Ga. Kuhr Bros., Inc. v. Spahos, 89 Ga. App. 885, 81 S.E.2d 491 (1954);
Kan. Whitsel v. Watts, 98 Kan. 508, 159Pac. 401 (1916);
La. Stewart v. Arkansas So. R.R., 112 La. 764, 36 So. 676 (1904);
Md. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951);
Minn. Purcell v. St. Paul City R.R., 48 Minn. 134, 50 N.W. 1034 (1892);
Mont. Kelly v. Lowrey & Williams, Inc, 113 Mont. 385, 126 P.2d 486 (1942);
Neb. Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674, *aff'd on rehearing* 135 Neb. 232, 280 N.W. 890, (1938);
New Hamp. Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950);
N.Y. Battala v. State, 10 N.Y.2d 237, 176 N.E.2d 729 (1961);
N. Car. Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936);
Ohio Lewis v. Woodland, 101 Ohio App. 442, 140 N.E.2d 322 (1955) (overrules footnote 19, *supra*);
Oklahoma Belt v. St. Louis-San Francisco R.R., 195 F.2d 241 (10th Cir. 1952);
Ore. Salmi v. Columbia & N. Riv. R.R., 75 Ore. 200, 146 Pac. 819 (1915);
R.I. Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907);
S. C. Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958);
Tenn. Memphis St. R. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917);
Tex. Hill v. Kimball, note 20, *supra;* Duty v. General Finance Co., 154 Tex. 16, 273 S.W.2d 64 (1954);
Va. See note 15, *supra;*
Wash. See note 9, *Supra*, c.f. O'Meara v. Russell, 90 Wash. 557, 156 Pac. 550 (1916); Frazee v. Westrn Dairy Prod., 182 Wash. 578, 47 P.2d 1037 (1935);
Wis. Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

III. Modern Approaches

Recalling that the action for mental distress is closely related to that for injury caused by fear, it is noteworthy that the American courts have allowed damages in almost all situations where there is injury or a contemporary tort upon which to attach the damages for mental distress.

Generally, the rule today allows no recovery for mental distress alone resulting from mere negligence. The courts, including those following the minority rule in relation to injury caused by fear, have made exceptions in certain fact situations allowing mental distress damages to be a parasitic element, such as in a trespass on plaintiff's person or property, a negligent physical injury, injury to reputation, freedom of movement or right of privacy.

When there is contemporaneous injury, the courts do not separate the injury from the mental distress. In other actions, mental distress is an exception to the rule and independent of the actionable tort, such as simple assault, invasion of property or breach of contract; a special duty placed on public carriers requires even less than simple assault to bring forth damages for mental distress.[22]

The history of injury from psychic stimuli discussed in Section II shows that the development of the action has not been strong or certain. England adopted and then rejected the doctrine that no award may be given. American courts rejected the rule in the majority of cases for allowing damages, but then shifted, and in doing so, created the exceptions discussed above. Today, so many exceptions to the rule that mental distress is not actionable have been created that it would seem that awarding mental distress damages is the general rule, and the few situations where it is rejected, viz., where there is mental distress alone, caused by mere negligence of the defendant, is the exception.

With the trend towards liberality in this field, the question arises—what will Colorado do when the case comes before the highest court? In analyzing the cases up to 1961, it might be concluded that Colorado would follow the more conservative *Mitchell* case, but since *Mitchell* has been overruled by the New York court, and because of recent liberalization in its own thought, a more modern decision will probably be forthcoming.

Battalla v. State reflects the modern thought on this broad field.[23] The facts stated in that case were that infant plaintiff was so frightened that she became hysterical when defendant's employee failed to fasten and lock the belt on the chair lift in which plaintiff had been placed. As a consequence of her fear, plaintiff suffered injuries.

In the opinion by Judge Burke, all the arguments against awarding damages were said to be of no effect any longer except that of public policy. He discusses the case by eliminating the public policy argument. Judge Burke first says: "Although fraud, extra

22 64 A.L.R.2d 103, 106.

23 New York has always been the leading state for not awarding damages, but they too have decided to reject the rule of the Mitchell case. "It is undisputed that a rigorous application of its rule would be unjust, as well as opposed to experience and logic. On the other hand, resort to the somewhat inconsistent exceptions would merely add further confusion to a legal situation which presently lacks that coherence which precedent should possess." Battalla v. State, *Supra* note 4 at 730.

litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction." Quoting from *Green v. T. A. Shoemaker & Co.*,[24] the court says:

> "The argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all* cases because in some a fictitious injury may be urged as a real one." . . . It seems that fraudulent accidents and injuries are just as easily feigned in the slight-impact cases and other exceptions wherein New York permits a recovery, as in the no-impact cases which it has heretofore shunned. . . .
>
> The *Mitchell* case encourages claimants to perjure themselves, and in itself causes excess litigation . . . Speculation of proof in individual situations should not be the arbitrary bases upon which to bar all actions.

In Colorado, we have as many exceptions to the rule of denying damages for mental distress as most jurisdictions, and more than some. Here, too, it has become the exception to deny damages for mental distress.[25] This is not a situation to be deplored, but one which is typical of the times. It is known that mental distress of a severe nature causes injury. It may take the form of injury caused by slight trauma which in turn operates upon a psychoneurotic condition, or it may take the form of injury from purely psychic stimuli.

Where there has been impact of substantial nature, the Colorado courts have always awarded damages for mental distress as an element of damages. The cases are too numerous and the law so well entrenched that citations are here omitted.

The courts have extended the rule to actions where there is but slight impact but serious injury, the typical psychoneurotic case. This is the area of tort law in which Judge Burke declares injuries are questionable and as easily feigned as in the situation where there is no impact.

Such a possibility existed in *City of Denver v. Hyatt*.[26] The plaintiff fell when she stepped into a hole in the boardwalk of a city street. The immediate result of the fall was a sprained ankle and a bruised back. Shortly afterwards she began suffering from what doctors claimed was a diseased abdominal organ. Several physicians testified, two were appointed by the court. One physician said that her internal condition was caused by the fall, another testified that her condition could be traced to other reasons. The first court-appointed physician said that such internal condition, as far as he knew, could never be traced to such a fall. The court allowed her damages, but added, that if the jury believed that her injury was the result of a latent disease activated from the fall, she might recover for the amount of aggravation. Finally, the court said,

> The sidewalks of the city are for the use of those with organic predisposition to disease as well as for the healthy and robust, and any injury which the former may sustain by reason of defects in such sidewalks, which result in ag-

---

24 111 Md. 69, 81, 73 Atl. 688, 692.

25 Judge Burke states that even the minority which has retained the rule of the Mitchell case has diluted it with exceptions. Batalla v. State, *supra* note 4 at 730.

26 28 Colo. 129, 63 Pac. 403 (1900).

> gravating an already diseased condition, are results for which the city must respond if otherwise liable.[27]

In *Colorado Springs & Interurban Ry. v. Marr*,[28] the court allowed testimony to the effect that plaintiff was unable to do her household duties or make large dinners, was losing her hair, getting gray hair, melancholy, etc., but stated that these were admissible only to show physical condition after the accident and not for compensation. However, the court also stated that if these damages were specially pleaded, there might be compensation forthcoming.[29]

In *Colorado Springs and Interurban Ry. v. Nichols*,[30] the court allowed damages for plaintiff's neurasthenia allegedly caused by being thrown from the seat of defendant's interurban railway car. In this case, however, plaintiff did prove her miscarriage was a result of the negligence and if neurasthenia developed as a result of that unquestionably unhappy event, the chain of causation would stem from defendant's negligence.

In the next case, the question was not whether there were damages, but whether it was error for the trial court to refuse defendant's motion to subject plaintiff to a physical examination to determine if the damages were permanent. In *Western Glass Mfg. Co. v. Schoeninger*,[31] the court held it to be error. Evidence indicated that plaintiff's immediate injury was negligible. There was no visible injury nor at the time did the alleged injury inconvenience the plaintiff. Two or more weeks after the injury the plaintiff consulted a physician and upon statements of plaintiff and plaintiff's mother, the physician diagnosed and treated the injury as Saint Vitus dance with partial paralysis. After a month plaintiff returned to work as before. A year later the physician examined plaintiff in order to prepare himself to testify at the trial. It was claimed that plaintiff would have recurring attacks of paralysis for life. These facts seem to indicate a psychoneurotic condition which at most was aggravated by the injury, yet the court did not consider this point in its decision.

Perhaps the most obviously psychoneurotic situation is seen in *Colorado Springs & Interurban Ry. v. Allen*.[32] As plaintiff was alighting from an electric streetcar, she claims the car gave a jerk which in turn subjected her to injury to her spinal column, nervous system, circulation and general health. According to the testimony, plaintiff's exclamations of pain did not begin for several months after the accident. The trial court instructed the jury as to damages saying:

> In arriving at the amount of your verdict, you may take into consideration the nature and character of the injuries, the mental, physical pain if any, she has suffered or will suffer as the proximate result of such injuries.[33]

Again there was no discussion of the possible aggravation of an

---

27 *Id.* at 139, 63 Pac. at 406.
28 26 Colo. App. 48, 141 Pac. 142 (1914).
29 Injuries were incurred when plaintiff was knocked to the ground while alighting from the electric car.
30 41 Colo. 272, 92 Pac. 691 (1907).
31 42 Colo. 357, 94 Pac. 342 (1908).
32 48 Colo. 4, 108 Pac. 990 (1910).
33 *Id.* at 11, 108 Pac. at 993.

already existing neurotic condition; there was merely an acceptance of the claims as plaintiff made them.

Finally, in *Parker v. City & County of Denver*,[34] where plaintiff was injured on a faulty sidewalk, suffering minor injuries at the time but severe later effects, the court held she had a valid claim for damages. But when plaintiff fell through the trap door in defendant's kitchen and brought an action for damages suffered as a result of appendicitis, the court drew the line, saying the claim was too remote.[35]

In reciting these cases to the reader, it is not to be implied that the plaintiffs should not receive compensation for their injuries and the mental distress suffered at the time and as a result of the injuries. It is meant to point out that such slight traumatic stimuli causing severe injury results in a claim for substantial damages in all of the above cases. Colorado has long given such damages to plaintiff, but for many years indicated that it would not allow plaintiff substantial damages for mere psychic stimuli resulting in injury.[36]

In the case of a slight traumatic injury, the sarcasm that the true measure of defendant's damages is hindsight rather than foresight is a fact. The test of foreseeability is completely neglected in most cases, and once the defendant's action has been connected to the injury suffered by plaintiff, the door is thrown open to any re-

34 128 Colo. 355, 262 P.2d 553 (1953).
35 Burnside v. Peterson, 43 Colo. 382, 96 Pac. 256 (1908).
36 Hall v. Jackson, 24 Colo. App. 225, 134 Pac. 1511 (1913).

sulting claim within reason. Thus a five dollar touch becomes a five thousand dollar claim.[37]

Hubert Winston Smith and Harry C. Solomon, in their article *Traumatic Neuroses in Court,* have divided injury actions into three groups, perhaps over-simplifying the situation.[38]

1. Those cases where there is slight stimuli, causing great harm. This group is made up of those suffering from a pre-existing neurotic condition, upon which the slight stimulus operates, causing more harm than would have been caused in the average constituted person.

2. Those cases where there has been a great stimulus, either trauma, or psychosyncratic, and has resulted in injury. These cases are made up of the average constituted person who would have been injured by such stimulus.

3. Those borderline cases which do not clearly fall in either class. This is the clincher, for these cases are those that cause courts most trouble, and, because of the difficulty in proof, have resulted in the *Mitchell* rule when psychic stimuli alone is involved.[39]

Although the authors state that these groups can be easily divided, it is impossible to separate them clearly for each group must blend into the other like different shades of whites, grays and blacks.

In the same article, the authors state:

> It may also be accepted as true that all individuals have some tendency or capacity to worry, to be fearful, to be concerned, and that all have some psychoneurotic manifestations. This is much like saying that no one is free of some fear or bodily pathology, but not thereby ill.[40]

Thus, if it is true that all persons have some tendency to psychoneurotic manifestations, we can see that the degree and complexities of the stimuli working upon the individual, the amount of predisposition towards a psychoneurotic condition, and the severity of the stimuli, whether traumatic or psychic, all contribute to the amount of resulting injury. This cause and effect phenomena can more easily be understood by a quotation from *Law and Medicine.*

> All neurotic phenomena are based on insufficiencies of the normal control apparatus. They can be understood as involuntary emergency discharges that supplant the normal ones. The insufficiency can be brought about in two ways. One way is through an increase in the influx of stimuli; too much excitation enters the mental apparatus in a given unit of time and cannot be mastered; such experiences are called traumatic . . . .
>
> However, the expression 'too high' is a relative one; it means beyond the capacity of mastery. This capacity depends on constitutional factors as well as on all of the individual's previous experiences. There are stimuli of such overwhelming intensity that they have a traumatic effect on anyone . . . .[41]

37 Prosser, Torts 179 (2d ed. 1955).
38 Smith and Solomon, *Traumatic Neuroses in Court,* 30 Va. L. Rev. 87 (1943).
39 *Id.* at 107-109.
40 *Ibid.*
41 Curran, Law and Medicine 290 (1960).

The cause-effect described above is just the beginning of the eventual injury caused by the slight trauma or by the psychic stimuli. There develops a small difference in causation between the psychic stimuli resulting in injury and the minor traumatic experience which results in serious injury, after the phenomena described above. Smith calls the phenomena a focal experience. The development of the neurosis which is the visible injury seen by the court and jury may develop in a matter of minutes, hours, weeks, or even months.

From this very limited discussion it is possible to determine that psychic stimuli and minor traumatic impact resulting in severe incapacity have similar causes. However, it should be noted that there are situations where there is no causal connection between stimulus and neurosis because the injury was very severe or the psychic stimulus extremely harrowing. The usual case operates in the same way as the minor impact case. The stimuli, either psychic or traumatic, operates on a neurotic condition and causes serious injury or even disease. The legal difference is that in the jurisdictions where the minority rule expounded in the *Mitchell* case is followed, the minor impact results in an award for the plaintiff, while the severe psychic stimuli gives none. As can be seen by the above cases, Colorado has awarded damages for injuries resulting from minor impact; it is difficult to see why it will not in the future award damages for psychic stimuli.

The general rule for awarding damages for mental anguish when the plaintiff has suffered a contemporaneous injury allows courts and juries to consider fright at the time of the injury, apprehension as to its effects, nervousness, or humiliation at disfigurement. However, Colorado has placed some arbitrary lines in the area of apprehension as to its effects and humiliation at disfigurement. In this area, Colorado seems to be extremely conservative, or at least so in the past.

In *Diamond Rubber Co. v. Harryman*,[42] when the lower court allowed damages for mental suffering arising from disfigurement of the plaintiff, the supreme court held:

> *No rule for awarding damages for mental suffering, however caused can be formulated so as to define a certain basis upon which such damages can be estimated.* This is especially true with respect to mental suffering resulting from disfigurement. The cases in which damages should be allowed, if recoverable at all, should be confined to the narrowest possible limits, where it was evident that a claim therefor was meritorious.[43]

The door has been left slightly open. The major premise upon which the court bases its decision for declining damages is underlined, and points out that it is the same rule for which damages for fright causing injury was rejected in so many jurisdictions before the trend towards liberalization. It should be noted, however, that where there is an element of maliciousness or willfulness, the Colorado court follows the general rule.

In *Gerick v. Brock*,[44] plaintiff brought action for damages re-

42 41 Colo. 415, 92 Pac. 922 (1907).
43 *Id.* at 420-21, 92 Pac. at 926.
44 120 Colo. 394, 210 P.2d 214 (1949).

sulting from a personal assault by defendant. The defendant allegedly pushed the plaintiff from defendant's car when the injured man attempted to prevent the defendant from using the car. The plaintiff suffered numerous wounds about the head and body and a double fracture of his right leg. These injuries resulted in further suffering by the plaintiff, some of which must have been thought imaginary by the jury because it awarded only a fraction of what the plaintiff asked. The court allowed the plaintiff damages for nervous shock, physical and mental pain and anguish endured as a result of the injuries "together with such as will necessarily endure in the future . . . ."

A further differentiation was specified by the court in *Denver City Tramway Co. v. Martin.*[45] Plaintiff was injured when defendant's tramway car hit the surrey in which she was riding. The court said:

> In a case of this character we are inclined to the opinion that the rule established by the cases cited is, that any physical and mental suffering attending or arising from the injury received may be regarded as a part of the injury, and as such, a proper subject of compensation; but injured feelings which might arise in the mind, resulting from the injury, not being a part of the pain naturally attending the injury, cannot be regarded as an element of damages.[46]

The court lists as mental distress caused by injured feelings that mental pain and suffering caused by mortification, humiliation as a result of a maimed, disfigured or crippled body. Since this case was decided one year after the *Diamond Rubber* case, it may be concluded that it is further amplification of the previous rule. However, it seems broad enough to exclude injury caused by psychic stimuli if the court continues to follow it.

A case more closely related to the question presented in this paper arose in *Grant v. Gwynn.*[47] Plaintiff Gwynn brought action for assault and battery, requesting damages for injury and exemplary damages. Defendant Grant denied and counterclaimed for mental distress, alleging that disturbances created by Gwynn over a period of time damaged her personal and business reputation and caused her to suffer shock and mental distress. The court rejected this claim saying:

> We consider first the question of whether the court erred in dismissing the two claims incorporated in the counterclaim of Grant. With reference to the first claim the trial court stated, in denying the motion for new trial: " . . . . there is no claim stated. There never was any breath of life in that claim." In essence, it is a claim arising from alleged emotional disturbance resulting from alleged threats and "annoying" conduct attributed to Gwynn which caused "mental distress" in the mind of Grant, over a period of time (not specified) prior to the incident which forms the basis for Gwynn's complaint.[48]

45 44 Colo. 324, 98 Pac. 836 (1908).
46 *Id.* at 338, 98 Pac. at 841.
47 365 P.2d 256 (Colo. 1961).
48 *Id.* at 259.

There, the mental distress was not caused by immediate fear of injury, nor by one severe psychic stimulus, but by many acts over a period of time. This would seem to cause a condition bordering on worry, rather than fear; there is some difference in the connotation of the words but both come under the general heading of mental distress. Although the court would not accept the fact that injury could result from mental distress over a period of time, this is a much more common phenomena than injury through fright, although both reactions are well known and documented at this date. Curran states that the stress of life plays an immense role in the development of neurotic illness,[49] and Smith, in his much mentioned article, states that repeated mental distress reactions are more likely to cause physical injury than one such stimulus.[50]

Other cases have stated a similar rule to that expressed in *Grant*, however, and those courts which award damages for injury caused by fear wrongfully caused by defendant seem to limit the situation to fear or severe psychic stimuli.[51]

In *Grant v. Gwynn*,[52] the court refused to accept defendant's theory. We cannot tell what evidence the defendant was able to produce, but it seems strange that the court was so dogmatic in refusing damages when it has been quite liberal in allowing mental distress damages resulting from breach of contract or damages based on similar actions.

The type of mental distress causation is the same, i.e. mental distress bordering on worry, which in turn reacts upon the neurotic disposition of the individual to produce injury.

A key to this puzzle may be found in *Hall v. Jackson*.[53] This case is often quoted in cases containing elements of mental distress claims, whether the claims relate to physical injury or contract. The court limited its decision to an action for breach of contract, against a defendant not engaged in business of a quasi-public nature, to recover substantial damages founded only upon mental anguish, humiliation and distress of mind. The breach was unattended by physical injury to the party bringing the action. There

49 Note 41 *supra*, at 288.
50 Note 38, *supra*, at 90.
51 C.f. Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937) Damages were allowed on showing a fear, but court stated worry would not bring forth the same judgment.
52 Note 47 *supra*.
53 24 Colo. App. 225, 134 Pac. 151 (1913).

was an absence of wanton or willful conduct on the part of the breaching party.

In a further analysis of the rule for awarding damages for mental distress, the court makes three classifications of cases.

a. In cases of pure tort, where no contractual relation exists and the acts complained of are attended with willful and wanton conduct on the part of defendant, substantial damages may be recovered for mental anguish and suffering only, though no physical injury or pecuniary losses (are) suffered by plaintiff.
b. In cases where a breach of contract has occurred and the acts attending such breach are accompanied by willful, insulting or wanton conduct of the one guilty of the breach, substantial damages may be recovered for mental suffering only.
c. In cases where a breach of contract has taken place and the one committing the breach was not engaged in business of a quasi-public nature, and the negligence consisted of a mere passable breach, unintentional, and unaccompanied by any acts of wantoness, willfulness or insult, on the part of the one committing the breach, an action for substantial damages, founded alone upon mental anguish and suffering, cannot be sustained; the rule stated being predicated, of course, upon the absence of a statute on the subject.[54]

In the above classifications the situation of injury caused by fright because of defendant's mere negligence is conspicuously absent. Nor is it included in further classifications listed by the court where damages for mental anguish may be given.

Mental distress damages may be awarded where:

1. By the merely negligent act of the defendant, physical injury has been sustained, and in this class of cases they are compensatory and the reason given for their allowance is that the one cannot be separated from the other.
2. Breach of marriage contract.
3. In the cases of willful wrong especially those affecting the liberty, character, reputation, personal security or domestic relations of the injured party.[55]

The court then added that if the people of the state think it is wise for damages for mental distress for other than those reasons listed above be given, they should urge the legislature to take action.

It was twelve years before the *Hall* case was broadened. In 1925, *Westesen v. Olathe State Bank*,[56] plaintiff brought action for damages for breach of contract stating that defendant bank agreed to lend the plaintiff money for a trip to California by crediting his account with such sums as he might need after reaching his destination. When plaintiff arrived in California, defendant refused to honor his checks. The trial court permitted damages for humiliation and mental suffering, and defendant brings error.

54 *Ibid.*
55 *Ibid.*
56 78 Colo. 217, 240 Pac. 689 (1925).

The supreme court distinguished the *Hall* case and, quoting from 17 C.J. 828, said:

> Mental pain and suffering in connection with a wrong which apart from such pain and suffering constitutes a cause of action is a proper element of damages where it is the natural and proximate consequence of the wrong.[57]

Thus, the court broadened the contract classification to include situations where there was a wrong, which produced mental anguish even though there existed no willful or wanton conduct.

Two later cases, *Fitzsimmons v. Olinger Mortuary Ass'n*[58] and *McCreery v. Millers Groceteria Co.*,[59] were decided reaffirming that Colorado would allow damages for mental distress caused by breach of contract when such breach was accompanied by willful or wanton conduct. This rule was stated in the *Hall* case, *supra*, as classification two. However, the court stated further that even if the breach was not of willful or wanton nature, nominal damages could be awarded for mental distress caused by the breach. This latter statement would seem to limit the rule laid down in the *Westesen* case to nominal damages rather than substantial damages.

Colorado has limited damages in wrongful death actions to pain and suffering of the deceased caused by the injury, but those suffered by the survivors of the deceased are not compensable.[60]

Finally, Colorado allows substantial damages for mental distress caused by willful insulting language of employees of common carriers. Such special burden placed upon the common carrier is the general rule,[61] and courts go far in following it. This may be demonstrated by *Bleeker v. Colorado & So. R.R.*[62] in which the court stated that it was basing its decision on breach of contract, but insinuated that common carriers have a special duty to those depending on its service and thus are placed in a special category for breach of common courtesy.

The action was brought for damages for mental suffering caused by insulting language of the conductor. The court first established the duty of a carrier to the plaintiff which, the court said, "included protection against the misconduct of employees." In refuting the defendant's claim that damages cannot be given for misconduct of employees, the court stated:

> For a breach of the contract of carriage as the result of a conductor assaulting a passenger without provocation, the authorities are practically unanimous in holding that for insulting language caused in connection with the assault, damages for mental suffering caused thereby may be recovered. If damages are recoverable for a breach of the contract in one instance, there is no good reason why a breach of such contract, as the result of using insulting

57 *Id.* at 219, 240 Pac. 690.

58 In Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932), plaintiff contracted with defendant mortuary to bring plaintiff's deceased husband's body from Walden to Denver and prepare it for burial. There was to be no publicity or notoriety. Defendant took pictures of the body being unloaded from the airplane and published it in two newspapers.

59 In McCreery v. Miller's Groceteria Co., 99 Colo. 499, 64 P.2d 803 (1937), plaintiff brought action for damages resulting from defendant's unauthorized use of plaintiff's photograph for advertising purposes, after plaintiff expressly told defendant it could not be used.

60 See Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951).

61 Prosser, *Torts*, 40-41 (2d ed. 1955).

62 50 Colo. 140, 114 Pac. 481 (1911).

> language, should not give a right of action independent of other acts which may constitute a breach.[63]

This case was decided before *Hall v. Jackson, supra,* but contains much more liberal ideas. Perhaps, if the court would have continued in the vein of thought expressed by the court in the above case, i.e., "damages resulting from mental suffering . . . are difficult of ascertainment, but the same is true in a greater or lesser degree, in all actions brought to recover unliquidated damages," Colorado could have been placed among the more modern courts in this field long before now.

IV. Projection

No case involving injury by fright has reached the Supreme Court of Colorado so it is necessary to hypothesize what Colorado will do when the court does have such a case by drawing indications from cases in related fields. This is difficult when the court seemingly takes a step forward and then a half step backward. It leads to confusion and uncertainty, but Colorado is not alone in this.[64]

In 1911, the Colorado Supreme Court decided *Hall v. Jackson, supra,* following the majority rule at that time, i.e., there could be no award for injury resulting from mental distress (fright) unless there was physical impact. Today, the rule followed in that 1911 case is no longer the majority rule, nor is it an equitable rule. as science has advanced to such a remarkable refinement that there can generally be little doubt that physical injury may be caused by fright.

The supreme court has recognized this development in medical knowledge which resulted in a change in legal thought on the subject in the recent case of *Valley Development Co. v. Weeks.*[65] Although the facts of the case indicated that plaintiff should not be awarded damages for her mental distress which allegedly caused her injury, the court, in a very lengthy and detailed decision by Mr. Justice Sutton, discusses the changing law in relation to awarding damages for injury caused by mental distress.[66] After pointing out that the case in issue, which involved trespass on property, not person, fell without the three classifications in the *Hall* case, the court stated:

> Hall also points out that "It may be said with safety that at common law no action could be maintained to recover for mental suffering in the absence of bodily injury occasioning such suffering." The law has moved from that position far forward today as the authorities referred to testify.[67]

Although this decision insists on staying within the ancient rules laid down in the *Hall* case, it does indicate the court may not

63 *Id.* at 146, 114 Pac. at 483.

64 "The case law in the field here treated is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed perplexity." 64 A.L.R.2d 103.

65 147 Colo. 591, 364 P.2d 730 (1961).

66 Plaintiff brought action against the Development Co. for deprivation of plaintiff's right to water from a ditch that had run across defendant's land before development. The court allowed compensation for actual damage but found that plaintiff's mental distress stemmed from an earlier condition.

67 Note 65 *supra* at 599, 364 P.2d at 734.

believe that in situations where injury resulted from fright, it would follow that case.

Why have the courts departed from that rule which denies damages in such situations? Our discussion to this point indicates that there are many situations today similar to the one where injury results from fright, and where the courts have for many years given substantial damages. Now we shall look specifically at the reasons for the change in courts' reasoning in relation to this field of personal right actions.

A careful and revealing analysis of the *Coultas* and *Mitchell* cases was done by Hubert Winson Smith.[68] He feels that there are three basic reasons for refusing damages. (1) That since fright caused by negligence is not itself a cause of action, none of its consequences can give rise to a cause of action, (2) that the damages resulting from fright are too remote, and (3) that it is contrary to public policy to allow recovery of damages for personal injuries resulting from fright.[69]

This same reasoning was used in *Hall v. Jackson, supra.* An analysis of these reasons, however, shows certain weaknesses which should be overcome.

The first reason appears to run afoul of the maxim "for every wrong, a remedy." It is settled that when a bodily injury occurs as a result of another's negligence, all resulting mental and physical damage is compensable. Why, then, when the injury occurs solely through mental distress should a cause of action be precluded?

In answer to the second reason, medical authorities say such damages are not remote. Laboratory experiments and observations over fifty years, including two world wars and the Korean war have established to a certainty that there is an essential interrelationship between physical organisms and the mental or emotional. Thus, severe shock to one reacts upon the other.[70]

When an individual is subject to a severe psychic stimulus, physical lesions or functional disorders are actually produced.

68 Smith, *Relation of Emotions to Injury and Disease,* 30 Va. L. Rev. 200, 206 (1944).
69 Smith, *op. cit. supra* at 215.
70 *Id.* at 217. (Some authorities disagree.)

This is especially true when occurring over a period of time. The article by Hubert W. Smith lists[71] systems or organs of the body known at that time to react physiologically to a single stimulus resulting in fear and rage. The two emotions are listed together because they react upon the mental and physical systems similarly and to the same degree. Also listed are 12 different recognized diseases that might be caused by such a stimulus along with symptoms which in turn might develop into other diseases.

Besides these physiological ailments, an individual may develop psychological disturbances which result in physiological complaints. These may eventually develop into actual physiological ailments. Dr. Winfred Overholser speaks of these ailments after discussing the possibility of direct effect upon the physical and organic systems.

> There is a considerable group of disturbances of personality, however, in which we now consider the causation to be primarily psychologic. This includes the entire group, for example, of what are known as the neuroses or the psychoneuroses . . . . As for physical symptoms of neurosis, they are legion. There may be anesthesia (loss of sensation), blindness or deafness, loss of voice (aphonia), or paralysis in what is known as the conversion type of neurosis, formerly referred to as hysteria. There may, too, be tremors, or even attacks of unconsciousness with convulsions. In the conversion neurosis, it is usually the sensory or motor systems which are affected. In others of the neuroses the alimentary system is predominantly affected instead, so that we may find painful symptoms referable to almost any system of the body such as the gastro-intestinal tract, the circulatory or genito-urinary sysem, the skin, and so on . . . . The importance of this group of symptoms in the so-called traumatic neuroses, that is neuroses which appear at least to have been precipitated by a physical injury, or an emotional shock, is considerable. It should not be thought that merely because the symptom, painful or otherwise is psychologically determined, it is imaginary, or non-existent. The complaints are painfully real; they do not respond well to physical treatment, except so far as that is suggestive therapy, but call for psychologic treatment instead.[72]

Laboratory experiments have discovered that actual lesion may develop from psychic stimuli. Skin diseases, ulcers, blisters, etc. may develop.[73] How, then, with this scientific evidence, can a court of law decide that any damage is not the direct result of psychic stimuli?

Perhaps the most difficult barrier for the courts to hurdle before awarding damages for injury caused by psychic stimuli is public policy. The difficulty lies in understanding the courts' reasoning when a decision is made to rest upon public policy.

Here there may be real justification for barring damages on public policy grounds.

71 *Ibid.*
72 Overholser, The Psychiatrist and the Law, 29-30 (1953).
73 Smith, op. *cit. supra* at 213.

Judge Black of Indiana said:

> We think it cannot be properly said that such injuries are imaginary or conjectural or that the sufferings described are not real nor does it seem to us proper today that they cannot be regarded as directly and naturally resulting from the act of the defendant as their proximate cause, but not every injurious effect of wrong can form the basis of damage.
>
> Many ill consequences follow from wrongs which proximate effect for which the law cannot afford redress because of the inadequacies of methods and means of courts to reach just and adequate results with sufficient certainty.[74]

Judge Black speaks of the difficulty of proof; but there are other reasons for which public policy is said to prevent awarding damages for injury by fright. The question must be raised as to how far the courts should extend the cause of action: to third persons, to anyone within hearing distance of the accident, or to only the immediate persons involved in the action?

These questions have been answered satisfactorily to the majority of the courts in some manner. In Colorado, many of the answers can be seen in procedure and past decisions in related fields. Judges and juries alike have been determining injuries from slander, converting them into money awards, and doing a satisfactory job for hundreds of years under our common law system. The usual phrase used is: "Relief is not to be denied because the exact amount cannot be ascertained."[75] It is also doubtful that, today, a plaintiff could successfully feign injuries of this nature.[76]

The final question raised by the public policy argument is whether "the flood gates of litigation" will be opened. In the first place, as said in the *Battalla* case, such a reason should not be used to bar an individual with a rightful claim.[77] In the second place, the formula of proof in all negligence actions would seem adequate to prevent such a flood of litigation from becoming so overwhelming.

The plaintiff in a civil action has the burden of proving by a preponderance of substantial evidence the concurrent existence of four terms of the formula: duty, dereliction, direct or proximate causation and damages. Any one of these four, if found lacking, will defeat plaintiff's cause. If the courts open the door to an action for damages caused by fright, it does not have to throw open the door to all claims based on such fright unless these four elements are present. No one has gone so far as to recommend that every person has a right not to be emotionally disturbed. Of course our modern day pace of living would not permit such a recommendation, but surely it would not deny an individual who has a genuine claim, based upon defendant's proven negligency, a deserving remedy.

---

74 Kalen v. Terre Haute & I.R.R. Co., 18 Ind. App. 202, 47 N.E. 694, 63 Am.St.Rep. 343 (1897).

75 Bullerdick v. Pritchard, 91 Colo. 276, 8 P.2d 705 (1932). See also Nebraska Drillers Inc. v. Westchester Fire Ins. Co., 123 F. Supp. 678, 682 (1953); Southern Colo. Power Co. v. Pestana, 80 Colo. 375, 251 Pac. 224, (1926).

76 Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497, 509. See also, Bohlon, *Fifty Years of Torts*, 50 Harv. L. Rev. 725 (1961).

77 Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 731 (1961).

V. Conclusion

> Justice is the constant desire and effort to render every man his due.
>
> Justinian

This paper, of necessity leaves many questions unanswered. How far should the doctrine of damages for injury caused by fright be expanded? Should all within a certain circle of danger be allowed to bring an action against the negligent actor? Should a parent be awarded damages for fright caused by fear for his child in turn caused by the negligent act of defendant? These questions are being answered in courts of the United States and England today, but would require another paper to discuss properly.[78]

Medical science is not a certain science today, and of course there will be many times when doctors disagree as to proximate causation of plaintiff's injury; this is not a new dilemma to courts.

That the problem has arisen in our courts today, as a result of not allowing damages for injury caused by frights, is also of immediate consequence, tending to minimize any problem that arises as a result of embarrassing the doctrine. Besides the inequity to the injured plaintiff caused by fear alone, in other situations courts look for the smallest trauma to base the defendan's action upon, and upon finding it, often allow an uncalled for amount of damages. This is as unjust as not allowing any damages at all.

Finally, it is not only proven that psychic stimuli causes injury in some cases, it is also proven that there are some individuals predisposed to this type of injury to a greater extent than others. Should a cracked vase be worth as much as a whole one? Perhaps, foreseeability is the answer to this question, but proof is another that should be taken into consideration on the part of defendant.

Some have said that courts should use the average man to determine if the psychic stimuli would have caused the injury and to what extent damages should be awarded.[79]

Thus, it cannot be said that there are no problems involved in this field any longer. That would be hypocritical and show a severe case of naivete.

However, courts are being hypocritical in not allowing a plaintiff a cause of action in deserving situations, and narrow in ignoring medical advancements, new theories and trends in law.

78 See 18 A.L.R.2d 221.

79 Courts should also keep in mind the difference between activating a latent disease, and compounding a present disease or condition.