Psychic Injury and Tort Liability in New York

Harold F. McNiece

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/lawreview/vol24/iss1/1

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
PSYCHIC INJURY AND TORT LIABILITY
IN NEW YORK *

I. INTRODUCTION

The problem of tort liability where a mental injury is involved has troubled the courts for a great many years, and even at present no consistent pattern of liability rules exists. When injuries and causes of injuries leave the realm of the tangible world and enter the uncharted areas of the mind, courts understandably have difficulty in establishing principles of law calculated to assure substantial justice. In the psychic injury field, Mr. Justice Douglas' observation, though made in another connection, seems to be of peculiar pertinence: "But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree." 1

More often than not, physical injury is easily detected and measured and the problem of causation relatively clear-cut. If a plaintiff be run down by a truck or automobile, the cause of the injury is manifest, and the extent thereof is fairly readily ascertainable through medical testimony. However, when mind becomes a significant factor in the skein of injury and liability, all the ordinary tort problems are

1 Estin v. Estin, 334 U. S. 541, 545 (1948).
intensified. Consider the apparently simple case wherein a plaintiff dies from the effects of fright which in turn resulted from a defendant’s negligent act in driving an automobile so close to plaintiff as to frighten him severely. Manifold problems at once arise. Was the result “foreseeable”? Would the reasonably prudent actor foresee that a consequence of negligent driving would be death through fright? Was the result “proximately caused”? Was the fright the substantial factor in producing the physiological reaction manifested in the heart attack? Again, was the plaintiff unduly susceptible to fright because of a pre-existing neurotic or psychopathic condition? Finally, is our medical knowledge sufficient to establish the answers to all these questions with adequate definiteness, or must liability be denied because of the generally speculative and uncertain character of the psychic phenomenon?

Such are the difficulties which confront courts as soon as a mental factor—the so-called “psychic stimulus”—enters the scene. Furthermore, if still another variable—a psychic injury—be introduced, the difficulties become even more complex. Assume in the above mentioned automobile negligence case that the plaintiff suffers not a physiological reaction but a psychic one—some form of neurotic, psychopathic, or psychotic condition. Then not only does the chain of causation contain as its main link a psychic stimulus, but the injury itself is a mental one. Thus problems of evaluation come to the fore. Is the mental injury real or feigned? Was the stimulus induced by defendant the substantial factor in producing the injury, or was it caused chiefly by the plaintiff’s pre-existing neurotic condition? Is the present state of our medical knowledge adequate to solve these problems, or must liability be denied because of the speculative character of the injury?  

And what of the possibility of fraudulent claims being foisted upon the courts?  

Do juries have sufficient competence to detect the true from the false in this new realm of mental injuries?

---


These queries are but a few of the many facing a court called upon to decide a case involving psychic injury. Truly then liability in this field is one of the unexplored frontiers of modern tort law. Such liability has had a long and varied history in England and in this country, and one of the most interesting phases of its development has occurred in the State of New York. The New York law on the subject is a complex admixture of the conservatism of the older English case law and the liberalism of present day psychiatry, all interwoven with a considerable dash of native aberrational variation. Since New York law on this question finds its genesis in English case law, it is well to consider briefly the historical aspects as illustrated in the British precedents.

II. Development of the English Rule

A. Early English Backgrounds

The primary root of legal liability through psychic causes can be traced back to the year 1349 to a tort action which recognized a liability for assault without physical touching under the writ of trespass. The reason for the de-

4 I. de S. et ux. v. W. de S., Y. B. 22 Edw. III, f. 99, pl. 60 (1349). "And it was found by verdict of the inquest that the said W. came in the night to the house of the said I., and would have bought some wine, but the door of the tavern was closed; and he struck on the door with a hatchet, which he had in his hand, and the woman plaintiff put her head out at a window and ordered him to stop; and he perceived her and struck with the hatchet, but did not touch the woman." Despite the woman's successful dodging of the missile, the court, speaking through Thorpe, C. J., felt that the mere attempt was a sufficient trespass to allow recovery.

Since this early case, assault rules have developed along the same general lines. A representative sampling of typical assault cases in various jurisdictions shows the present-day framework of rules surrounding the tort: Geraty v. Stern, 30 Hun 426 (N. Y. 1883) (taking one's cloak is an assault and battery though no actual touching of the body); Mortin v. Shoppee, 3 Car. & P. 373, 172 Eng. Rep. 462 (N. P. 1828) (threat, while shaking a whip, to the effect "Come out and I will lick you before your own servants."; an assault); Newell v. Whitcher, 53 Vt. 589 (1880) (persistent solicitations for sexual intimacy at night in woman's bedroom an assault); Croaker v. Chicago & N. W. R., 36 Wis. 657 (1875) (kissing of a girl an assault). The exact limits of assault are not absolutely determined, however. Cases endeavoring to make a delimitation include: Turberville v. Savage, 1 Mod. Rep. 3, 86 Eng. Rep. 684 (1669) ("If it were not assize-time I would not take such language from you.", not an assault in view of qualifying words); Brooker v. Silverthorne, 111 S. C. 553, 99 S. E. 350 (1919) (statement to a telephone operator over the telephone, "You are a G— D— liar. If I were there, I would break your G— D— neck.", not an assault but mere violent words).
cision, while not specifically stated in the brief opinion, probably was the policy consideration of preventing assaults and threatened breaches of the peace.

This case did mean, however, a breach in the dike, and after it, a way was opened, albeit small, to argue for redress of injury where no physical touching had occurred. The courts, treating assault cases as sui generis, were still very reluctant to move forward into the new field; and their reluctance to redress psychic injury carried over into those cases where there had been an independent legal injury as well as a psychic one. It was early held that parents had no right to the recovery of damages for mental anguish where injuries had been inflicted on their children,\(^5\) except in the case of seduction of a daughter.\(^6\) Thus, where the facts showed that defendant in the hearing of others had charged plaintiff, a woman, with unchastity, the court held that the special damage necessary to sustain the action had not been shown even though plaintiff’s nervous shock was sufficient to cause physical injury requiring medical attention.\(^7\) The chief ground of the holding seems to have been that the harm was too remote in the expectation of a reasonably prudent actor.\(^8\)

---

\(^5\) Flemington v. Smithers, 2 Car. & P. 292, 172 Eng. Rep. 131 (K. B. 1826) (boy of fifteen thrown from the seat of a coach by defendant’s negligence; no compensation for parents’ mental pain). To the same general effect as the husband-wife relationship was Huxley v. Berg, 1 Stark. 98, 171 Eng. Rep. 413 (K. B. 1815) (defendant’s conduct in burglarizing plaintiff’s house resulted in frightening plaintiff’s wife, she dying from the effects of the fright; no compensation for injury to wife).

\(^6\) Andrews v. Askey, 8 Car. & P. 7, 173 Eng. Rep. 376 (C. P. 1837) (in action by a widow for the seduction of her daughter, jury instructed that damages not confined to the mere loss of services but includes damages for distress and anxiety of the mother). This limitation of recovery for parental anguish in situations where the main injury is to the child to cases involving seduction is still the general rule.

\(^7\) Allsop v. Allsop, 5 H. & N. 534, 157 Eng. Rep. 1292 (Ex. 1860). It was necessary to prove special damage in this particular case because at the time charging a woman with unchastity was not slander per se. This rule was later altered by a statute, the Slander of Women Act, 54 & 55 Vict., c. 51 (1891).

\(^8\) It might certainly be questioned whether suffering physical injury from shock at being charged with unchastity is in truth an idiosyncratic reaction, as the court evidently felt. Perhaps in recognition of the weakness of that argument the court brought forth other arguments to the effect that there was no precedent for such liability and that allowing recovery would tend towards undue restriction of free speech.
B. The Coultas Case

Such was the state of the English judicial mind when the first important modern case, Victorian Railways Commissioners v. Coultas,\(^9\) arose in 1888. In that case it appeared that Mary Coultas and her brother had been riding in a buggy which the brother was driving. They came to defendant's railroad crossing, and defendant's gatekeeper negligently admitted them on the tracks when a train was coming. The train narrowly missed the buggy, and Mary Coultas was put in great fear and fainted. As a result of the experience she suffered severe shock, poor health, damaged eyesight, and impairment of memory. When the case reached the Privy Council,\(^10\) the negligence appeared clear, causation equally clear, and damages obvious, but the Council nonetheless decided that there was no liability. Its decision rested on the principle that there was no precedent for the action and that allowing such a suit could only mean increased litigation and encouragement of flimsy claims with great difficulties of proof. Furthermore, such damages were too remote to be compensable because injury was not the ordinary consequence of fright.

C. Cases Attacking the Coultas Reasoning

This case, severely criticized by legal writers and many lawyers and judges, did not long remain the law of England. It was first challenged by an Irish case\(^11\) which permitted recovery for physical injury due solely to psychic stimuli generated by defendant's culpable conduct, without any bodily impact. In that case a railroad car in which the plaintiff, Mrs. Bell, was riding began rolling down hill, putting her in fear of death. Later and as a result of the shock Mrs.

\(^9\) 13 App. Cas. 222 (P. C. 1888).

\(^10\) The case originally arose in Canada where the trial jury granted a verdict of $2,000 to Mary Coultas for her injury and $1,700 to her husband for loss of services and medical costs. The Supreme Court of Victoria affirmed the judgment, holding, contrary to the later view of the Privy Council, that physical harm from fright was a sufficiently proximate injury to allow recovery.

\(^11\) Bell v. Great Northern Ry., L. R. 26 Ir. 428 (1890).
Bell became very nervous and virtually demented. The jury found for plaintiff, and the case was sustained on appeal, Baron Palles modifying radically the theory of the Coultas case. Whereas the Coultas case had held that disability caused solely from fright was as a matter of law a consequence too remote in expectation of the reasonably prudent actor to constitute compensable damage, Baron Palles rejected that contention and said that it was for the jury to decide whether injury by fright was a reasonable and natural consequence of defendant's conduct.

In England itself the Coultas case was very shortly modified as an authority by Pugh v. London, B. & S. C. Ry., which involved a railway employee suing on a company policy insuring against "accidental injury." The employee, in an effort to stop a train which was in danger of being wrecked, suffered nervous shock, and illness resulted therefrom. Despite the fact that the psychic stimulus had caused the injury, the court found it to be "accidental" within the

---

12 It is interesting to note that though the Bell case is an important landmark in the final promulgation of the English liberal rule of liability without impact, the case itself when viewed in the perspective of later medical knowledge was probably wrongly decided so as to give plaintiff an undeserved verdict. Dr. Hubert Smith in Relation of Emotions to Injury and Disease, 30 VA. L. Rev. 193, 204 (1944), points out that the Bell case was such that, "The medical evidence relied upon as proving causation is subject to most serious doubts. One will recall that Mrs. Bell was able to continue her journey. It was not until three weeks after the frightening episode that her disability (mental derangement) appeared, an interval too long to warrant drawing a causal connection between stimulus and effect. Furthermore, the evidence indicated plaintiff was suffering from symptoms arising from a pre-existing neurological or psychiatric disorder. There are allusions in the record to 'before the last shock,' and the like, showing that distinct shocks were suffered some time after the frightening stimulus had ceased. From this we are entitled to infer that Mrs. Bell's complaints probably arose from independent cerebral vascular accidents not connected in any way with her frightening experience." This would seem to be a particularly good illustration of the difficulties of proof always inherent in the psychic stimulus situation.

13 Baron Palles expressed his view in these words: "... I am of opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be 'a consequence which, in the ordinary course of things would flow from the negligence.' unless such injury 'accompany such negligence in point of time.'" Bell v. Great Northern Ry., supra note 11 at 440.

meaning of the policy. Another case shortly afterwards continued the liberalizing tendency in allowing a recovery for injury resulting from nervous shock caused by intentional and wanton use of words.

The final acceptance of the new doctrine was enunciated in a leading case which allowed recovery for damages due to nervous shock and fright resulting in illness and premature birth. It there appeared that plaintiff, a pregnant woman, was working behind the bar in her husband’s public house when defendant negligently drove a pair-horse van into the pub, putting plaintiff in fear of being trampled underfoot.

D. Later English Holdings

Later cases both in England and Scotland have followed this liberal line of reasoning. Representative of the more important of the recent decisions is Owens v. Liverpool Corporation. In that case a hearse was struck by a tram-

---

15 In discussing the Coultas case, Lord Esher, M. R., remarked in dismissing it as an authority: “That case is different, and I should not like to express an opinion as to whether we ought to follow it until I am forced to do so.” Ibid. at 250.

16 Wilkinson v. Downton, [1897] 2 Q. B. 57 (a woman falsely informed that her husband was injured). The court pointed out that the Coultas case had not been followed in Pugh v. London, B. & S. C. Ry., supra note 14, and had been repudiated in Ireland in Bell v. Great Northern Ry., supra note 11. While it did not feel called upon expressly to repudiate the Coultas case, the court achieved the same effect by distinguishing the Wilkinson case from it on the ground that the latter involved an intentional injury rather than a negligent one.

17 Dulieu v. White & Sons, [1901] 2 K. B. 669, 677. Kennedy, J., paid high tribute to the well reasoned opinion of Baron Palles in the first case which had challenged the Coultas view, Bell v. Great Northern Ry., supra note 11. It was also pointed out that the Coultas case had been “unfavourably reviewed by legal authors of recognized weight such as Mr. Sedgwick, Sir Frederick Pollock and Mr. Beven.”

18 Hambrook v. Stokes Bros., [1925] 1 K. B. 141; Coyle v. Watson, [1915] A. C. 1, 13. In the latter case the court flatly stated: “But in England, in Scotland, and in Ireland alike, the authority of Victorian Railway Commissioners v. Coultas has been questioned, and . . . the case can no longer be treated as a decision of guiding authority . . . .”

19 Gilligan v. Robb, Sess. Cas. 856, 47 Scot. L. R. 733 (1910) (recovery allowed for illness caused by nervous shock without impact; a cow dashed from the street into the house where plaintiff was staying). Plaintiff claimed that she sustained a very severe nervous shock and was hysterical for a considerable time. She had to be put to bed, her pulse became high, her heart was affected, and she was thereafter unable to appear on the streets unaccompanied.

car negligently driven by defendant's servant so that the hearse was severely damaged and the coffin overturned. The court held that the mourners at the funeral could recover damages for mental shock in an action for negligence although there was not even any apprehension of injury to a human being. Thus it may be said that the principle is now firmly established in the British Isles that actual injury culpably caused by psychic stimuli is actionable whether or not accompanied by contemporaneous physical impact.

In the Owens case the plaintiffs were the aged mother of the deceased, an uncle, a cousin, and the cousin's husband. Plaintiffs alleged that they "witnessed" and "were horrified by" the accident, that the old mother had in consequence suffered from "severe shock and collapse," and the other three from "severe shock." The court, through MacKinnon, L. J., discussed the case of Hambrook v. Stokes Bros., [1925] 1 K. B. 141, wherein a mother was allowed to recover for shock occasioned from apprehension of injury to her young children, and extended its application to cover the Owens situation, saying, "On principle we think that the right to recover damages for mental shock caused by the negligence of a defendant is not limited to cases in which apprehension as to human safety is involved. . . . In the present case the shock was said to have been occasioned, not by any fear for human life, but by the imperilment of the coffin containing the corpse of a near relative. . . . A man. . . might readily be disbelieved if he alleged that such an incident as this had caused him the form of ill health which is known as shock. The present plaintiffs might well have been disbelieved in that assertion, but the learned deputy-judge believed them, and we think we must accept his findings of fact. It may be that the plaintiffs are of that class which is peculiarly susceptible to the luxury of woe at a funeral so as to be disastrously disturbed by any untoward accident to the trappings of mourning. But one who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him; it is no answer to a claim for a fractured skull that its owner had an unusually fragile one." Owens v. Liverpool Corporation, supra note 20 at 400, 401.

Even under the liberal English view there must, of course, be a duty owed to the plaintiff before there can be any recovery in negligence, as illustrated by the recent decision in Hay or Bourhill v. Young, Sess. Cas. 395 (1941), aff'd by House of Lords in [1943] A. C. 92. There a motorcyclist, while negligently driving at an excessive rate of speed, collided with an automobile and was killed. The plaintiff, a fish-wife, was standing 45 feet from the point of contact. She heard the noise although she did not see the accident. She admitted that at the time she had no reasonable fear of immediate bodily harm to herself, but alleged that she suffered severe nervous shock which disabled her from carrying on her trade for a considerable time. The fish-wife was eight months pregnant when the accident occurred and one month later gave birth to a stillborn child. Lengthy opinions were written by Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter. The view taken was that the duty of the motorcyclist on the road was to drive with reasonable care to avoid risk of injury (including injury by shock) to such persons as he could reasonably foresee might be injured by his failure to exercise that care, but that the fish-wife was not within the area of potential danger and accordingly was owed no duty. The court (in the opinion of Lord Porter) dealt at length with Hambrook v. Stokes Bros., supra note 21 (discussed), and Owens v. Liverpool Corporation, supra
III. Development of the American Rule

Before examining the particular growth pattern of the New York rule it is important to attain an over-all view of the general state of the law in the United States relating to emotional disturbance. It has already been noted that the law is well crystallized in England, Scotland, and Ireland as favoring liability in the psychic injury cases. Unfortunately American law is in no such state of certainty, but is rather marked by great confusion and diversity of opinion.

A. Early American Backgrounds

The earliest American cases took the view that there could be no remedy whatever for mental injury. Numerous reasons were cited to explain this denial of liability though none of the reasons seem compelling, at least when examined in the perspective of modern medical knowledge. A favorite argument was that mental disorders and consequences could not be considered proximate results because they were lacking in tangibility and dependent upon the individual peculiarities of the person injured. Modern medical evidence is, of course, directly opposed to this view, and is overwhelmingly of the opinion that emotional distress can cause both mental and physical disorders, even in that hypothetically sturdy person, the "reasonably prudent man."
Still another contention was that mental injury was so difficult of proof as to make the problem of measuring damage insuperable. Perhaps the quickest answer to this argument is that courts have always allowed recovery for mental pain and suffering where such suffering accompanied a physical injury even though the physical injury was of slight character, and hence have had extensive experience in evaluating mental pain.

Bolstered by these arguments and by the belief that a flood of litigation would be let loose were barriers once relaxed in the mental injury field, the courts erected strong dikes. An early manifestation of this tendency was the rule that words alone did not constitute an assault and were, in the absence of slander, not actionable.

B. Development of Modern Rule on Intentional Injury

The breakdown in the early strict rule against recovery occurred first in those situations where some already well recognized tort had been committed so that the mental injury could be "tacked on" to the ordinary damages traditionally associated with the tort. The next step was to

---


26 E.g., Croaker v. Chicago & N. W. Ry., 36 Wis. 657 (1875) (railway conductor kissed young woman passenger, $1,000 damages awarded against the company); Draper v. Baker, 61 Wis. 450, 21 N. W. 527 (1884) (spitting in plaintiff's face in the presence of others, $1,200 damages awarded).


28 Kramer v. Ricksmeier, 159 Iowa 48, 139 N. W. 1091 (1913); Brooker v. Silverthorne, 111 S. C. 553, 99 S. E. 350 (1919). For an account of the especially interesting circumstances in the Brooker case, see note 4 supra.

29 This growth is illustrated in Anthony v. Norton, 60 Kan. 341, 56 Pac. 529 (1899) (primary injury seduction); Draper v. Baker, 61 Wis. 450, 21 N. W. 527 (1884) (primary injury battery); Kline v. Kline, 158 Ind. 602, 64 N. E. 9 (1902) (primary injury assault); and Goodell v. Tower, 77 Vt. 61, 58 Atl. 790 (1904) (primary injury false imprisonment). Because of the nature of these damages as subsidiary to some underlying main and well recognized element of injury, they have sometimes been referred to as "parasitic." Some writers have regarded such "parasitic" damages as the first step in the formation of the new cause of action. See, e.g., 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 460, 470 (1906): "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution.
allow recovery in special situations where mental suffering alone had been caused by an intentional act of an unusually indefensible character. For example, where hotel authorities entered the room of married persons, wrongfully charging them with occupying the premises for immoral purposes, re-

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.”

Whether or not this growth pattern reflected thus far in psychic stimuli cases is to continue into the future has been the subject of some controversy. Thus Prof. Magruder seems to feel that negligent disturbances of peace of mind may be in the future held to result in liability, even where no physical harm results just as today wilful invasions of peace of mind are held actionable. Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033 (1936). Dr. Smith feels otherwise, however. “It seems to us that redress of willful invasions of mental tranquillity is not a seed destined to burst forth into a more luxuriant growth but rather an exotic plant which has already reached full bloom. First, even if disturbing the placidity of another’s psyche is a bad thing and a real injury, no objective standard exists or ever will, for measuring its value. The trier of fact cannot possibly escape the psychological urge to make damages correspond to the actor’s culpability, and this makes the award punitive even though in theory it is still compensatory. Second, the prime mover in society would be unduly penalized and prevalent neurotic patterns in the populace encouraged and we think that neither result is desirable. Psychic stimuli multiply as society becomes more complex and people are crowded together, but this is part and parcel of existence. Our concern should be with conditioning the citizen, and with breeding more toughness by pampering the psyche less.” Smith, Relation of Emotions to Injury and Disease, 30 VA. L. REV. 193, 228, 229 (1944). On Dr. Smith’s point that psychic stimuli multiply as society becomes more complex and people are crowded together, an item in Time, November 29, 1948, p. 72, is interesting: “More and more U. S. old folks are ending up in mental institutions. In 1922, only 9,229 patients over 65 were admitted to mental hospitals; in 1939, there were 18,227; in 1946 the figure had climbed to 29,987. These statistics look ‘appalling’ to Dr. Riley H. Guthrie, who last week settled into his new job as a special mental hospital consultant to the U. S. Public Health Service. One reason for the increase is obvious, Dr. Guthrie believes: ‘As the span of life increases, more people reach the senile period . . . . The incidence of illness increases anyway with the aging process, and mental illness is one of them.’ Another factor is the growth of cities. ‘City dwellers can’t tolerate little aberrations [among members of their families] as well as country people.’ City life, too, is more complicated for the mentally ill. (A Guthrie example: ‘A shepherd in Wyoming might be as schizophrenic as can be. He wouldn’t last five minutes in Times Square.’)”

It should be noted that the oft-referred to “recent tendency” towards allowance of recovery for intentional infliction of mental disturbance (see, e.g., PROSSER, TORTS 54 [1941]), is perhaps more an invention of the writers than of the courts. Except in the technical assault, common carrier, innkeeper, and burial right cases there seems to be no such important tendency. The cases cited for the proposition in Prosser, TORTS 61 (1941) and in Prof. Magruder’s article, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033 (1936), all seem to fit into these well recognized categories or involve physical and mental injury both, with the possible exception of Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932).
covery was allowed.\textsuperscript{30} Liability was also imposed in the analogous situation where employees of common carriers intentionally mistreated or insulted passengers.\textsuperscript{31} In recognition of the same principle a number of cases saw fit to apply a similar rule to possessors of land who held such land open to the public for business purposes.\textsuperscript{32}

Practical jokes, when obviously carried beyond the reasonable bounds of propriety, have also resulted in liability,\textsuperscript{33} as have unnecessarily abusive activities of landlords in evict-

\textsuperscript{30} Emmke v. De Silva, 293 Fed. 17 (C. C. A. 8th 1923); Dixon v. Hotel Tutwiler Operating Co., 214 Ala. 396, 108 So. 26 (1926). The Restatement apparently decides in favor of liability in the hotel cases on the ground that a technical trespass has been committed. See \textsc{Restatement, Torts} § 47, illustration 3 (1934): "A hotelkeeper intrudes into a room in his hotel occupied by two guests, B and his wife. He accuses them of being unmarried and using the room for improper purposes and orders them to leave the hotel. The hotelkeeper, having committed a trespass in entering the room, is liable also for the humiliation which his conduct has caused to B and his wife." If the Restatement means to restrict liability to those situations where a trespass has occurred, its view seems clearly unsound. It would be manifestly unjust to permit a different result merely because the hotelkeeper stands outside the room and shouts his imprecations without crossing the threshold. See, on this point, Magruder, \textit{Mental and Emotional Disturbance in the Law of Torts}, 49 \textsc{Harv. L. Rev.} 1033, 1051 (1936).

\textsuperscript{31} May v. Shreveport Traction Co., 127 La. 420, 53 So. 671 (1910) (unjustified attempt to put plaintiff in "Jim Crow" car); Lamson v. Great Northern R., 114 Minn. 182, 130 N. W. 945 (1911) (insult to passenger); Humphrey v. Michigan United Rys., 166 Mich. 645, 132 N. W. 447 (1911) (vociferous argument over fare, humiliating plaintiff).

The Restatement's position is a good summary of the existing law. \textsc{Restatement, Torts} § 48 (1934): "Special Liability of Carrier for Insults by Servants. A common carrier is subject to liability to members of the public who are entitled to and are utilizing its facilities as passengers for the offense reasonably suffered by them through the insulting conduct of its servants while otherwise acting within the scope of their employment.

"Caveat: The Institute expresses no opinion as to whether the rule stated in this Section is not also applicable to public utilities other than common carriers and to possessors of land who for their business purposes hold it open as a place of public resort."

\textsuperscript{32} Smith v. Leo, 92 Hun 242, 36 N. Y. Supp. 949 (N. Y. 1895) (dancing school); Weber-Stair Co. v. Fisher, 119 S. W. 195 (Ky. 1909) (theater); Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S. W. 692 (1916) (circus); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209 (1904) (amusement park). These cases cover the area marked out in the Restatement's Caveat to § 48. See note 31 supra.

\textsuperscript{33} Wilkinson v. Downton, [1897] 2 Q. B. 57 (woman falsely informed that her husband had been injured); Great Atlantic & Pacific Tea Co. v. Roch, 160 Md. 189, 153 Atl. 22 (1931) (dead rat included by defendant's servant in grocery package); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920) (plaintiff encouraged to search for alleged pot of gold, great humiliation of plaintiff involved).
Holding creditors for outrageous actions in seeking collection of their debts is an illustration of the same tendency.\(^{35}\)

A limitation upon the right of recovery for intentional infliction of mental suffering has oftentimes been imposed where the act causing the mental suffering was intended to affect not the plaintiff but rather some third party.\(^{36}\) The present state of the law seems to restrict recovery in such situations to flagrant cases involving violent attack perpetrated under conditions particularly likely to cause shock to a third person.\(^{37}\)

### C. Development of Modern Rule on Negligent Injury

As would be expected, the courts have been more reluctant to permit recovery for interferences with peace of mind that are merely negligent as distinguished from purposeful.\(^{38}\)

\(^{34}\) Preiser v. Wielandt, 48 App. Div. 569, 62 N. Y. Supp. 890 (2d Dept 1900); Nordgren v. Lawrence, 74 Wash. 305, 133 Pac. 436 (1913).


Along the same lines are cases dealing with defendants in authoritative positions who have abused the authority granted them. E.g., Johnson v. Sampson, 167 Minn. 203, 208 N. W. 814 (1926) (authorities of school accused girl pupil of unchastity and threatened to send her to reform school unless she confessed); Janvier v. Sweeney, [1919] 2 K. B. 316 (defendant's private detectives attempted to get possession of certain letters of plaintiff by threats).

\(^{36}\) But cf., Hill v. Kimball, 76 Tex. 210, 13 S. W. 59 (1890) ; Duncan v. Donnell, 12 S. W. 2d 811 (Tex. Civ. App. 1929). These cases allowed recovery on the ground that the result was reasonably foreseeable. Similarly, in Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924), the court refused to apply the foreseeability rule as a limitation on recovery. There the plaintiff, a pregnant woman, suffered injury through sight of an attack on her father; the plaintiff herself was at a perfectly safe distance from the attack. Said the court: "... defendant says he did not know of plaintiff's presence and was not aware of her condition; that therefore he could not be responsible for injuries which he could not anticipate or foresee. It is a sufficient answer to this to say that if defendant's wrongful act is the proximate cause of injury to plaintiff, of the character for which the law allows compensation, then the question whether defendant could or should have foreseen the result becomes immaterial." Lambert v. Brewster, *supra* at 127, 125 S. E. at 245.


\(^{38}\) For generalized discussion of the objections voiced by courts refusing to allow recovery, see Burdick, *Tort Liability for Mental Disturbance and Ner-
1. Where Physical Harm Results

Where the negligent conduct of the defendant results in immediate physical harm, courts have not hesitated to allow recovery for the mental injuries accompanying the physical hurt. It is only when the physical injury comes later as a result of the earlier psychic stimulus that disagreement in the holdings appears. Under such circumstances many jurisdictions, including New York, Massachusetts, and several others, have allowed recovery. However, there are jurisdictions, at least in the absence of "impact," that deny recovery in such cases. These include California, New Jersey, Pennsylvania, and others.

1. Where Physical Harm Results

Where the negligent conduct of the defendant results in immediate physical harm, courts have not hesitated to allow recovery for the mental injuries accompanying the physical hurt. It is only when the physical injury comes later as a result of the earlier psychic stimulus that disagreement in the holdings appears. Under such circumstances many jurisdictions, including New York, Massachusetts, and several others, have allowed recovery. However, there are jurisdictions, at least in the absence of "impact," that deny recovery in such cases. These include California, New Jersey, Pennsylvania, and others.
York, have demanded that some physical impact, however slight, occur before recovery will be granted; the impact is regarded as the guaranty of trustworthiness for the claim. The majority of courts have repudiated the requirement of impact, and allow recovery for physical injuries negligently caused through the effects of psychic stimuli whether or not any physical touching

case, supra, as one of precedents denying recovery); Howarth v. Adams Exp. Co., 269 Pa. 280, 112 Atl. 556 (1921) (plaintiff won under an exception but the court recognized the general rule as denying recovery).


Interestingly enough the jurisdictions denying liability include most of the important industrial states (Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio and Pennsylvania); there seems, however, no direct causal relation between the economic industrialization and the development of the rule of law. Personal communication to author from John V. Thornton, Department of Economics, Yale University, May 15, 1948. A better explanation is probably that these courts, because of their greater volume of litigation, had to deal with the question when it first arose (most of their pioneer cases date from the beginning of this century or earlier) and before the later liberalizing tendencies had set in. See on the same point, Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 725, 733 (1937).

It may well be, however, that the large concentration of urban areas in many of the minority rule jurisdictions has caused them to retain the impact rule as originally laid down. All the jurisdictions which have cities in excess of one million population have the impact rule, except California which adopted its law on the subject before Los Angeles became a great city. Since "ambulance chasing" is preeminently an urban problem, it may be that these jurisdictions have retained the impact rule as a preventative against the false claims of ambulance chasers. However, as is discussed subsequently, the alleged protection furnished by the impact rule is more illusory than real.


That the guaranty of trustworthiness is more supposed than real is shown by the fact that courts have indicated that the most trivial impact is sufficient and such an impact may be readily feigned. See, e.g., Porter v. Delaware, L. & W. R. R., 73 N. J. L. 405, 63 Atl. 860 (1905) (dust adequate impact); Morton v. Stack, 122 Ohio St. 115, 170 N. E. 869 (1930) (smoke adequate impact); McArdle v. George B. Peck Dry Goods Co., 191 Mo. App. 263, 177 S. W. 1095 (1915) (slight jar adequate impact); Homans v. Boston Elevated R. R., 180 Mass. 456, 62 N. W. 737 (1902) (slight battery adequate impact); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S. E. 680 (1928) (evacuation of bowels by horse adequate impact).
occurs.\textsuperscript{43} The tendency in the workmen's compensation field has also been towards liability.\textsuperscript{44}

2. Where Mental Harm Results

In those few cases which have involved only mental injury from a psychic stimulus, the almost universal view is to deny recovery where mere negligence, with no element of intentional harm, appears.\textsuperscript{45} The only significant exception seems to be in the telegraph company cases where a few courts have permitted recovery for mental anguish alone.


The remaining jurisdictions (i.e., other than those cited in footnotes 40 and 43) seem not to have taken any definite stand on the question. In Jepson v. Jensen, 47 Utah 536, 155 Pac. 429 (1916), the court failed to pass on the question, having decided that case on the theory of wilful wrongdoing. The English, Irish, and Scottish rules, as previously discussed, favor liability, see notes 11, 17, 18, and 19 supra.


when caused by the negligent transmission of an obviously important message.\textsuperscript{46}

IV. BACKGROUND OF THE NEW YORK RULE

Prior to the birth of the modern rule in \textit{Mitchell v. Rochester Ry.},\textsuperscript{47} there was a mixed and indecisive series of New York cases which, though rarely enunciating legal principles with clarity, nonetheless pointed the way towards the final formulation of the rule in later years. Their importance lies not in their own reasoning, but in their formative and moulding effect upon the later judicial mind.

A. Early Cases Denying Recovery

The oldest case dealing directly with the question of psychic disturbance was an action of trespass brought by a father for an assault and battery committed by a schoolteacher upon plaintiff's son.\textsuperscript{48} There the wounded feelings of the parent were held not compensable in damages, the court distinguishing the principle of the seduction cases

\textsuperscript{46}Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1 (1895); Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574 (1888); Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930).

The federal rule denies liability in such cases, Western Union Tel. Co. v. Speight, 254 U. S. 17 (1920), as does the majority state rule, Western Union Tel. Co. v. Chouteau, 28 Okla. 664, 115 Pac. 879 (1911); Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078 (1894); Morton v. Western Union Tel. Co., 53 Ohio St. 431, 41 N. E. 689 (1895). The existence of a federal rule becomes largely academic as to intrastate messages under \textit{Erie R. R. v. Tompkins}, 304 U. S. 64 (1938), requiring federal courts to follow state decisions on matters of general law, but the federal rule would still be of importance as to interstate messages.

The English courts have moved much further than the American in allowing recovery for mental shock. Thus Owens v. Liverpool Corporation, [1939] 1 K. B. 394 (discussed in note 21 supra), allowed mourners at a funeral to recover damages for mental shock in an action for negligence, the negligence being the operation of a tramcar so as to damage the hearse and overturn the coffin. American cases exhibiting the same trend in permitting recovery for mental distress caused by negligent handling of dead bodies are Clemm v. Atchison, T. & S. F. R. R., 126 Kan. 181, 268 Pac. 103 (1928); and Klumbach v. Silver Mount Cemetery Association, 242 App. Div. 843, 275 N. Y. Supp. 180 (2d Dep't 1934).

\textsuperscript{47}151 N. Y. 107, 45 N. E. 354 (1896).

\textsuperscript{48}Cowden v. Wright, 24 Wend. 429 (N. Y. 1840). The action was trespass \textit{per quad servitium amisit}.
which had permitted recovery for the injury to parental feelings.49

A similar trend towards denial of liability was manifested in an early fright case.50 There plaintiff, a pregnant woman, was standing in the doorway of her home with her five year old child, when the defendant's run-away horse dashed toward her and was halted only by the presence of a heavy post. The plaintiff sustained a severe shock which brought on a long train of nervous diseases, but the court refused to allow any recovery.51 In line with that decision, it was also held 52 that the erection of a memorial statue

49 Nelson, C. J., in Cowden v. Wright, supra note 48, said: “It is true that in the action for the seduction of a daughter, the jury, in fixing upon the damages, may regard the wounded feelings of the family; but that case has always been considered sui generis, and inconsistent with the fundamental principle of the action (i.e., loss of services). Besides, there is a marked distinction between that and the present case. There the only remedy for the injury is the action by the parent; the daughter is without redress, however aggravated the seduction. It is not therefore surprising that the courts should have been indulgent in the measure of damages in the particular case. But here the child may also maintain an action against the defendant, in which the measure of redress depends very much upon the sound discretion of the jury because his personal injury and suffering then constitute the gravamen of the suit.”

That Chief Judge Nelson’s opinion in the Wright case represented the definite opinion of the judiciary at the time is indicated in a similar observation made by Chief Judge Bronson a few years later in Bartley v. Richtmyer, 4 N. Y. 38, 43 (1850): “It is obvious from the nature of the case, that the master ought not, in point of principle, to recover anything more than a compensation for the pecuniary loss which he has sustained: and such was formerly the rule in this action, as it is still where the master sues for the battery of a servant. (Cowden v. Wright, 24 Wend. 429; Whitney v. Hitchcock, 4 Denio 461.) But it is now settled, that a father may recover exemplary damages for the seduction of his daughter; and very large, not to say outrageous verdicts, have become a part of the fashion of the times.”

To the same effect, see Knight v. Wilcox, 15 Barb. 279 (N. Y. 1853), where Judge Strong commented: “In all such cases, loss of services is the only ground upon which an action can be supported. (Bartley v. Richtmyer, 4 Comst. 38, and cases there cited.) In respect to the damages which may be recovered, where a right of action exists, there is an important distinction between cases of debauching female servants, and other injuries to servants; in the former, the loss of services is not the measure of damages, but the entire wrong to the master, to his character and feelings, as well as in respect to his right to services, may be considered, and exemplary damages allowed; but in the latter the damages must be measured by the pecuniary loss.” (Citing inter alia the Wright case, supra note 48.)


51 The court made no particular effort to reason out the theory of the action. Dykman, J., in affirming a dismissal of the complaint, remarked simply: “We have been unable to find either principle or authority for the maintenance of this action and we have been referred to none by the counsel.” Lehman v. Brooklyn City R. R., supra note 50 at 356.

52 Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1895).
honoring a prominent decedent did not warrant injunctive relief in favor of a relative since there was nothing in the statute calculated to offend any but the abnormally sensitive. A vigorous dissent foreshadowed later development of the right of privacy.

B. Early Cases Allowing Recovery

Another series of cases held the other way and permitted recovery for emotional distress. It is important to note, however, that this latter series was consistently marked by some sort of slight impact or already recognized legal injury to which the psychic harm could by very tenuous reasoning be somehow affixed. Thus, where defendant came upon plaintiff's sidewalk and piazza on numerous occasions and expressed his opinion of the plaintiff in "low, vulgar, vile, and abusive language," plaintiff was allowed to recover on the notion that defendant had committed a trespass to plaintiff as an abutting owner, although it was obvious to all that the real injury was the vilification.

In the same fashion where an impact could be found in defendant's hitting plaintiff's horse while it was drawing

---

53 Peckham, J., in Schuyler v. Curtis, supra note 52 at 448, 42 N. E. at 26, said: "We cannot assent to the proposition that one situated as the plaintiff in this case can properly enjoin such action as the defendants propose on the ground that as mere matter of fact his feelings would be thereby injured. We hold that in this class of cases there must in addition be some reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice nor of pure fancy, nor the result of a supersensitive and morbid mental organization, dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy. . . . Feelings that are thus easily and unnaturally injured and distressed under such circumstances are much too sensitive to be recognized by any purely earthly tribunal."

54 Id. at 453, 42 N. E. at 27, per Gray, J.: "Upon the findings in this case, I think we are bound to say that the purpose of the defendants was to commit an act which was an unauthorized invasion of the plaintiff's right to the preservation of the name and memory of Mrs. Schuyler intact from public comment and criticism."

55 This again is the notion of "parasitic" damages. See the discussion in note 29 supra concerning the theory of "parasitic" damages as a transitional step in the evolution of an independent cause of action.

56 Adams v. Rivers, 11 Barb. 390, 397 (N. Y. 1851). Williard, P. J., worked out the trespass rationale in this manner: "The defendant had no right to be upon the plaintiff's piazza after he was ordered to depart. Perhaps he had no right to be there at all. That was a distinct act of trespass. The language of the defendant while committing a trespass was proper to qualify the act, and show with what spirit it was done."
plaintiff's wagon, the court considered the attack an assault upon plaintiff himself. Another holding indicated that a psychic stimulus could be a valid link in the chain of causation. It there appeared that plaintiff was a passenger in one of defendant's horse cars which was negligently driven almost in front of an express train; to avoid the anticipated danger of being struck, plaintiff jumped from the horse car and sustained slight physical injury. Recovery was permitted despite the fact that the injuries were caused through plaintiff's frightened act. In a "rescue" case, the same trend was followed in the situation where a plaintiff-rescuer was injured while saving a person imperiled by defendant's negligence. The plaintiff's injury was clearly the result of the psychic stimulus manifested by the urge to rescue, but the defendant was nonetheless held liable. Two dissenters, however, felt that plaintiff's injury was within the maxim *volenti non fit injuria*, so as to destroy the chain of causation.

---

67 Bull v. Colton, 22 Barb. 94, 95 (N.Y. 1856). The defendant whipped and beat plaintiff's horse, so that the horse became frightened and reared up. Plaintiff claimed only for damages to the horse, but Balcom, J., indicated that such a set of facts would have also sustained a cause of action for an assault upon the plaintiff himself. "There can be no doubt but that the plaintiff could have sustained an action in the Supreme Court for an assault upon his person and recovered damages therefor and for the injury to his horse."


69 Objectively speaking, plaintiff was in fact not in danger, since the horse car driver succeeded in getting the car across the tracks in time to escape the train, the engineer thereon having reversed his engine and put on the brakes. However, Allen, J., felt that "the jury having found the plaintiff was placed by the reckless or careless act of . . . the defendant, in such a position as compelled her to choose upon the instant, and in the face of an apparently great and impending peril, between two hazards, a dangerous leap from the moving car, or to remain in the car at certain peril. They have also found that her action was such as might have been taken by any one of ordinary prudence, placed in the same situation, and was not the result of such enforced action." *Id.* at 160. That plaintiff's conduct was in fact eminently "reasonable" is perhaps best indicated by the fact that all the passengers on the horse car, save one, did exactly as she did.

60 Eckert v. The Long Island R. R., 43 N.Y. 502 (1871).

61 It should be noted, however, that it is not necessary in rescue cases that the rescuer act on the basis of a spur-of-the-moment impulse. Recovery is allowed even though the rescuer deliberates before acting. See, e.g., Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

62 "The act of the intestate in attempting to save the child was lawful as well as meritorious, and he was not a trespasser upon the property of the defendant, but it was not in the performance of any duty imposed by law, or growing out of his relation to the child, or the result of any necessity. There is nothing to relieve it from the character of a voluntary act, the performance
The final holding looking in the direction of liability for invasions of peace of mind was *Foley v. Phelps*. There plaintiff's husband died in Bellevue Hospital where he was taken after an accident, and, despite plaintiff's protestations, the hospital performed an autopsy. The court held that a cause of action would lie on the theory of invasion of the legal right to perform the duty of burial, and seemed favorably disposed towards the allowance of recovery for the mental suffering sustained.

of a self-imposed duty, with full knowledge and apprehension of the risk incurred." *Id.* at 508 (dissenting opinion by Allen, J.). The effect of Judge Allen's reasoning would be to break the chain of causation which the majority recognized, and to hold that the psychic urge to rescue was not a valid link in that chain.


64 "Irrespective of any claim of property [in the dead body], the right which inhere[d] in the plaintiff as the decedent's widow, and in one sense his nearest relative, was a right to the possession of the body for the purpose of burying it . . . ." *Id.* at 555, 37 N. Y. Supp. at 473. To the same effect, see Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891); Burney v. Children's Hospital in Boston, 169 Mass. 57, 47 N. E. 401 (1897). A similar theory has been invoked to permit recovery for the unauthorized disinterment of a dead body. Gostkowski v. Roman Catholic Church, 262 N. Y. 320, 186 N. E. 798 (1933); England v. Central Pocahontas Coal Co., 86 W. Va. 575, 104 S. E. 46 (1920).

65 After commenting that the *Foley* case was one of first impression in New York, the court went on to comment with favor on the leading Minnesota case, Larson v. Chase, supra note 64, saying: "It is there [in the Larson case] also held that the rule of damages would allow a recovery for mental suffering and for injury to the feelings occasioned directly by the unlawful mutilation and that although no actual pecuniary loss or damage was proven. It is not for us at this time to express any opinion with respect to the measure of damages in a case of this kind; but we are satisfied that the action will lie . . . ." *Foley v. Phelps*, supra note 63 at 556, 37 N. Y. Supp. at 474.

While virtually all courts have allowed recovery for intentional mishandling of corpses through unauthorized autopsy, disinterment, or other cause, there is a strong tendency not to permit recovery where the interference is merely negligent. Kneass v. Cremation Society, 103 Wash. 521, 175 Pac. 172 (1918). But cf. Clemm v. Atchison, T. & S. F. Ry., 126 Kan. 181, 268 Pac. 103 (1928); Owens v. Liverpool Corp., [1929] 1 K. B. 394. On the same point see also cases cited note 46 supra.

In an analogous situation, most courts deny recovery for mental anguish caused by negligent delay in delivering a message telling of death in the family. Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901 (1892); Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674 (1901); Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973 (1894). The minority rule in the telegraph cases is represented by Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1 (1895); Green v. Telegraph Co., 136 N. C. 489, 49 S. E. 165 (1904). On the same point see also cases cited note 46 supra.
C. Summary

Prior to the Mitchell case, therefore, it would seem that the New York law, while unsettled and at best hazy in the outlines of its reasoning, was leading to the position which the Court of Appeals was finally to take, namely that negligently caused emotional disturbance would not support a recovery even where it consequentially resulted in physical injury. The line of cases going the other way had all contained some extra consideration, such as an impact, however minute, or a relational legal interest or an immediate and spur-of-the-moment, as it were, physical harm.

V. The Mitchell Case

A. The Holding Itself

What is commonly regarded as the leading New York case on emotional disturbance was decided in 1896 by the Court of Appeals, Mitchell v. Rochester Ry. There it appeared that defendant's employee drove his horses so negligently that plaintiff, a pregnant woman, was put in extreme peril of being run down. Plaintiff was standing on a crosswalk waiting to board defendant's horse car; and, although plaintiff was not touched by the horses, so close did they come to her that she was standing between their heads when the horses were finally reined up. Terrified and excited, plaintiff fell, and shortly afterwards developed sickness which culminated in a miscarriage.

When the case reached the Court of Appeals, the highest tribunal saw fit to reverse both the Special Term's decision

---

66 151 N. Y. 107, 45 N. E. 354 (1896).
67 The opinion of the circuit court described the injuries in these words: "The fright and excitement of the occurrence made the plaintiff unconscious. As the result of the shock she then sustained she suffered a miscarriage, and was sick for a long time. It appeared from the testimony of the physicians that the mental shock which she then received was a sufficient cause for all the physical ailments from which she subsequently suffered." Mitchell v. Rochester Ry., 4 Misc. 575, 25 N. Y. Supp. 744 (1893).
68 Mitchell v. Rochester Ry., supra note 67. In a well-considered opinion, Rumsey, J., pointed out: "There is no doubt that if the horses of the defendant had struck the plaintiff, and broken her leg, she could recover for that injury. So if, to avoid the impending collision between herself and the horses, she had sprung aside, and fallen and broken her leg, she could undoubtedly
and the unanimous holding of the General Term,\(^6\) and to affirm the order of the Trial Term granting the non-suit. The decision was put upon several grounds. It was reasoned that, first of all, since a plaintiff cannot recover damages for mere fright negligently caused, it follows that no recovery can be had for the physical consequences of such fright.\(^7\) Secondly, the court felt that the miscarriage was not a natural and probable consequence of defendant’s negligence but was due to an accidental and highly unusual combination of circumstances. This meant that defendant had not in a legal sense proximately caused the damages, and hence they were too remote for recovery.\(^7\) Finally, on grounds of public policy, it was imperative to deny recovery in order to forestall fictitious suits, feigned injuries, and proof conjectural and highly speculative in nature.\(^7\)

B. Analysis of Arguments in the Mitchell Case

Since the Mitchell case is the primary foundation stone upon which the New York law rests, it is well to conduct a

---

\(^6\) Mitchell v. Rochester Ry., 77 Hun 607, 28 N. Y. Supp. 1136 (Gen. Term, 5th Dep’t 1894), affirming the Special Term’s holding that liability could exist against defendant. Dwight, P. J., Lewis, Haight and Bradley, J.J., were the members of the court.

\(^7\) "Moreover it cannot be properly said that the plaintiff’s miscarriage was the proximate result of defendant’s negligence. . . . The plaintiff’s injuries do not fall within the rule as to proximate damages." Id. at 110, 45 N. E. at 355. See also note 23 supra.

\(^7\) "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injuries complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture and speculation." Id. at 110, 45 N. E. at 354.
rather searching analysis of the opinion to determine just how solid or infirm this foundation may be.

1. The Argument from Precedent

While the Court of Appeals did not discuss the factual background of any of the cases cited as precedents, it did seem to rely especially on three cases, *Victorian Railways Commissioners v. Coultas,* an English case already discussed in a previous section; *Ewing v. Pittsburgh, C. & St. L. R. R.;* and a lower court case decided in New York, *Lehman v. Brooklyn City Ry.*

The English precedent even then had been severely attacked, and five years later it was absolutely overruled.

---

23 13 App. Cas. 222 (1888).
24 See text, supra page 5. In the *Coultas* case plaintiff suffered shock when defendant's employee negligently admitted her buggy on the railroad tracks in the path of an onrushing train. The Privy Council denied recovery, basing its decisions on arguments virtually identical with those of the Court of Appeals in the *Mitchell* case.
25 147 Pa. 40, 23 Atl. 340 (1892). The circuit court in the *Mitchell* case felt that the *Ewing* case was not a valid precedent for the *Mitchell* factual situation. See *Mitchell v. Rochester Ry.,* 4 Misc. 575, 25 N. Y. Supp. 744 (1893), where the circuit judge commented: "It may be conceded that where no physical injury whatever has been suffered by the plaintiff, but only a severe fright, followed by no serious consequences, an action will not lie for damages on account of the negligence of the defendant. The rule in that regard is laid down in the case of *Canning v. Inhabitants of Williamstown,* 1 Cush. 451, to the effect that damages are not recoverable on account of a risk or peril which causes only fright and mental suffering, but, where any actual injury to the plaintiff is sustained, the accompanying mental suffering is a part of the injury, for which damages may be recovered. The case of *Ewing v. Railroad Co.,* seems to have been decided by the court upon that principle, for it is said there that the plaintiff's 'only injury proceeded from fright, alarm, fear, and nervous excitement and distress, and there was no allegation that she had received any bodily injury'; and the court say [sic] that there is no case 'in which it has been held that mere fright, unaccompanied by some injury to the person, has been held actionable.' But in this case the jury might have found that the serious bodily sickness from which the plaintiff afterwards suffered was the result of the mental shock caused by the negligence of the defendant."
26 47 Hun 355 (Gen. Term, 2d Dept. 1888). There plaintiff was frightened by a runaway horse whose dash towards her was only arrested by a heavy post; and the injury suffered was a train of nervous diseases. The opinion was not closely reasoned, the court simply remarking: "We have been unable to find either principle or authority for the maintenance of this action and we have been referred to none by the counsel."
27 By Bell v. Great Northern Ry., L. R. 26 Ir. 428 (1890); in an opinion of the noted Baron Palles. Pugh v. London, B. & S. C. Ry., [1896] 2 Q. B. 248, also tended to erode the authority of the *Coultas* case.
28 The overruling case was Dulieu v. White & Sons, [1901] 2 K. B. 669. See text, page 7 supra, for discussion of the facts in the *Dulieu* case which,
The New York case was of doubtful persuasiveness since it had come only from a lower court and contained no analysis at all of the problem. The Ewing decision was from a foreign jurisdiction, and, as indicated by the lower court's opinion in the Mitchell case, was by no means an unequivocal holding that physical injuries resulting from fright were not compensable. It is apparent, therefore, that the precedents relied on were of exceedingly doubtful character and in no sense compelled the court to decide as it did.

2. The Argument from Analogy to Fright Cases

The reasoning of the court in this argument is summarized by Martin, J., in these words:

If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom.

But is the answer quite so obvious as the court would have us believe? It is true that fright alone, at least in most jurisdictions, cannot form the basis of an action, but the
reason why that is so is that it involves no measurable damages to plaintiff.\textsuperscript{84} As has been pointed out by several noted writers, the court's somewhat glib statement upon analysis comes down to a complete non sequitur.\textsuperscript{85} Professor Bohlen rightly indicates that the "fundamental vice" in the court's opinion is that it assumes that the plaintiff is alleging fright as the basis of recovery and the physical injury merely in aggravation of damages.\textsuperscript{86} Actually, of course, the fright is

\textsuperscript{84} Smith points out that "this erroneous argument proceeds as follows: First the court assumes correctly that mere fright negligently caused is not actionable; ergo injury which is a consequence of fright being one step further removed from defendant's conduct is a fortiori too remote to be compensable. But the true reason for not compensating simple fright is that it involves no measurable damage and this reason vanishes if physical injury ensues." Smith, \textit{Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stinui}, 30 \textit{VA. L. Rev.} 193, 208 (1944).

\textsuperscript{85} See Bohlen, \textit{Right to Recover for Injury Resulting from Negligence Without Impact}, 41 \textit{AM. L. Reg.} (n. s.) 141 (1902); reprinted in part in \textit{Studies in the Law of Torts} (1926); the pertinent discussion is at page 265 of the latter. To the same effect is Throckmorton, \textit{Damages for Fright}, 34 \textit{Harv. L. Rev.} 260, 266 (1921): "Of this reasoning [the analogy to fright in the \textit{Mitchell} case] it is to be said that the premise is admitted, but not the conclusion. The reason that negligence causing mere fright is not actionable is for want of damage. \textit{De minimis non curat lex}. The mere temporary emotion of fright not resulting in physical injury is, in contemplation of law, no injury at all, and hence no foundation of an action. In like manner negligence per se is not actionable, but negligence causing injury is. In each case the gist of the action is the injury flowing from defendant's wrongful act. Physical injury, therefore, caused by defendant's wrongful act is actionable, whether the wrongful act operates through the medium of impact or of nervous shock."

The fallacy in the \textit{Mitchell} reasoning has also been recognized by the more enlightened courts. Illustrative of this recognition is the opinion of Evans, J., in Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 320, 73 So. 205, 207 (1916): "Damages, when confined to fright alone, is [sic] dealing with a metaphysical, as contradistinguished from a physical, condition, with something subjective instead of objective, and entirely within the realm of speculation. So the damages suffered where the only manifestation is fright are too subtle and speculative to be capable of admeasurement by any standard known to the law; but when the damages are physical and objective as consequent upon the physical pain and incapacity manifested by and ensuing upon a miscarriage, the damages are quite as capable of being measured by a jury as if they had ensued from an impact or blow."

\textsuperscript{86} Bohlen, \textit{supra} note 85 at 265: "While the court (in the \textit{Mitchell} case) was correct in holding that no recovery may be had for 'mere fright,' it is submitted that it was clearly wrong in its opinion that the 'logical result' of such a holding is that no recovery 'can be had for injuries which are the direct consequence of it.' The court overlooks the fact that no recovery is allowed for mere fright because fright is not of itself such an injury as must be shown to maintain an action for negligence and that where physical injury is shown to have resulted, the plaintiff has proved an injury sufficient to sustain the action, the only question being whether or not the injury is the legal consequence of the negligence which caused the fright."

"The fundamental vice of the court's opinion is that it assumes that the plaintiff is alleging her fright as the ground for her recovery, and is alleging
proved merely in an effort to show the chain of causation extant between the physical injury and the defendant's act of negligence. The court's mistake lies in the failure to distinguish between fright as the primary injury for which recovery is sought and fright as a mere link in the causal relationship.

3. The Argument from Proximate Cause.

Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual and may, therefore, be expected. . . . The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and, hence, her damages were too remote to justify a recovery in this action.\(^7\)

That reasoning is untenable, for so to hold as a matter of law is clearly opposed to modern scientific evidence.\(^8\)

---

The physical consequences merely in aggravation of the damages, whereas the fact is that she has alleged and proved her physical injury as her ground of action and has alleged and proved the fright merely to show the causal connection between the defendant's negligence and her physical injury. The opinion shows a complete inability to distinguish between fright as the injury for which an action is brought and fright as a necessary link in the chain of causation between the defendant's negligence and the plaintiff's physical injury for which recovery is sought.\(^9\)

See also Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922) (seeking to show that fear, itself, since it is manifested in physiological changes, may be considered a "physical" injury).


"That serious physical disorder is the every-day consequence of fright or nervous shock is a fact, not only established by modern science, but one which has long been accepted by the ordinary man." 89 It logically follows that, since shock does have this undoubted propensity for causing physical injuries, anyone who unreasonably subjects another to a fright of such a character as to be likely to result in physical injury is subjecting that other to an unreasonable risk of bodily harm. 90 When bodily injury in fact follows upon the fright, the risk to which the plaintiff was subjected has come to fruition, and defendant should be held accountable. 91

It is interesting to discover that many of the jurisdictions, including New York, which deny recovery for injuries resulting from fright alone, permit a recovery where the fright was accompanied by some impact in itself insignificant as compared with the injuries produced by the shock. 92 Certainly no better evidence than that could be found to indicate the flimsiness of the conclusion that damages resulting from fright or shock cannot be considered as proximate. 93

89 Burdick, Tort Liability for Mental Disturbance and Nervous Shock, 5 Cor. L. Rev. 179, 186 (1905). Prof. Burdick's conclusion is that "It [physical disorder from nervous shock] would seem, therefore, to fall within the category of natural and probable consequences."

Even the Massachusetts court, while denying recovery on public policy grounds to forestall fictitious and speculative claims, did not subscribe to the proximate cause argument, pointing out that, "Great emotion may and sometimes does produce physical effects. A physical injury may be directly traceable to fright and so may be caused by it." Spade v. Lynn & Boston R. R., 168 Mass. 285, 288, 47 N. E. 88 (1897).

90 This reasoning would seem to be thoroughly consonant with § 306 of the Restatement: "Acts Likely to Cause Physical Harm Through Mental Disturbance. An act may be negligent, as creating an unreasonable risk of bodily harm to another, if the actor intends to subject, or realizes or should realize that his act involves an unreasonable risk of subjecting, the other to an emotional disturbance of such a character as to be likely to result in illness or other bodily harm." ReSTATEMENT, Torts § 306 (1934).

91 See Throckmorton, Damages for Fright, 34 Harv. L. Rev. 260, 268, 269 (1921). For general discussions of the "natural and probable" as a test of causation in tort, see Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 103 (1911).


93 Throckmorton, supra note 91 at 270.
4. The Argument from Public Policy.\textsuperscript{94}

The Mitchell decision, so far as its legal reasoning is concerned, must rest primarily upon the argument advanced by the court on the ground of public policy:

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.\textsuperscript{95}

That argument is not at once either refutable or sanctionable on a purely logical level, and the answer to it lies more within the realm of statistical data. It is impossible,

\textsuperscript{94} Another guise, not here taken up in the text, in which the public policy argument is sometimes cloaked is "the lack of precedent argument"—i.e., the argument that the fact that courts have not allowed liability for such a cause of action in past years indicates a general recognition by bench and bar that the harms constituting such cause are not, on grounds of public policy, of a compensable type.

The argument is specious, and if at any time accurate, clearly is inapplicable to the instant situation because there has never been any general acquiescence in the no-liability rule, and the reports are filled with cases seeking to circumvent it. It may be pointed out also that the common law does not proceed on the theory that a case of first impression presents a situation for the exercise of legislative rather than judicial power.

Prof. Throckmorton dismisses this alleged public policy reason as "... no reason at all. If it were, every case of first instance would be decided against the party invoking the new rule of law or the new application of an old rule. It would put an end to all growth or progress of the law through judicial decision." Throckmorton, supra note 91 at 274. The same view is expressed judicially in Lambert v. Brewster, 97 W. Va. 124, 138, 125 S. E. 244, 249 (1924), "As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy."

\textsuperscript{95} Mitchell v. Rochester Ry., 151 N. Y. 107, 110, 45 N. E. 354, 355 (1896). The denial of liability in such cases by the Massachusetts court was also placed on the public policy argument. See Spade v. Lynn & Boston R. R., 168 Mass. 285, 47 N. E. 88 (1897). Justice Holmes viewed the decision in the Lynn case as not "... a logical deduction from the general principles of liability in tort, but as a limitation of those principles upon purely practical grounds." Smith v. Postal Tel. Cable Co., 174 Mass. 576, 577, 578, 55 N. E. 380 (1899), and in another connection characterized the denial of liability in the psychic stimuli cases as "... an arbitrary exception, based upon a notion of what is practicable." Homans v. Boston Elev. R. R., 180 Mass. 456, 457, 62 N. E. 737 (1902).
of course, to make an exact count of the number of cases which have arisen in the trial courts of jurisdictions permitting recovery as opposed to the number arising in the states denying liability. It is possible, however, to check the views of the appellate courts themselves since presumably they would be familiar with the volume of litigation in their own jurisdictions.

Proceeding on this basis, it is at once obvious that the fear of the successful prosecution of fraudulent claims has not impressed the vast majority of appellate judges in the United States, as shown by the fact that the states which have laid down rules of law on the question during the present century have almost uniformly held that injury from psychic disturbance is actionable. The courts of these states agree with a noted jurist of the English Court of Appeal who in a leading case commented that he had been able to find "... only about half a dozen cases of direct shock reported in about thirty years. ..." As with the argument from proximate cause, probably one of the best refutations of the public policy argument lies in the fact that in the trivial impact cases all the alleged

---

96 The Supreme Court of Texas has well expressed the majority view's conclusion that the fear of increased litigation is without foundation in fact. "The reported cases would indicate that the litigations arising from injuries inflicted through a mental shock are not so numerous as to cause any considerable increase of litigation." Gulf, etc., Ry. v. Hayter, 93 Tex. 239, 242, 54 S. W. 944, 945 (1900). The opinion of most courts seems to be that it is a harsh doctrine indeed absolutely to deny recovery in all cases merely because an occasional non-meritorious claim might succeed. "The institution and maintenance of suits for false claims is recognized, but to what extent in comparison with honest ones is not a matter of judicial notice; nor is it a matter of such notice in what measure false claims are successful. To hold that all honest claims should be barred merely because otherwise some dishonest ones will prevail, is not enough to make out a case of public policy." Chiuchiolo v. New England Wholesale Tailors, 84 N. H. 329, 335, 150 Atl. 540, 543 (1930). To the same effect is Dulieu v. White, [1901] 2 K. B. 669, 681, wherein Kennedy, J., commented "... I should be sorry to adopt a rule which would bar all such claims on grounds of public policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial or redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim."

97 The ratio during the present century of states allowing recovery to those denying it is approximately 6 to 1. For the exact line-up of the jurisdictions on this question, see notes 40, 43 supra.

hazards of fabricated claims are present,⁹⁹ and yet almost all jurisdictions allow the plaintiff to recover in the trivial impact cases.¹⁰⁰ There seems no reason to think that a jury would find it more difficult to weigh medical evidence as to the effects of nervous shock through fright than to weigh precisely the same type of evidence as to effects of nervous shock through an automobile collision or other accident where a very slight battery has occurred.¹⁰¹

To hold that all honest claims should be barred merely because otherwise some dishonest ones would prevail is stretching the public policy concept very close to the breaking point, especially since it is quite as simple to feign emotional disturbance plus slight impact and get in “under the wire” of one of the exceptions as it is to feign emotional disturbance sans impact. The arbitrary denial of recovery in all cases not falling within the realm of one or another of the exceptions discourages the bringing of meritorious actions and at the same time allows the prosecution of fabricated claims, for surely those capable of perjuring evidence will not hesitate to manufacture one additional feature of the occurrence—a slight impact—to insure recovery.

The final straw to break the back of the “flood of litigation” argument is the fact that the reported cases reveal that the volume of litigation has been heaviest in those states denying recovery due to the extensive exceptions always constructed by the courts of such states.¹⁰²

---

⁹⁹ It would seem no more difficult to make out a false case of slight impact than to fabricate a claim involving no impact at all.

¹⁰⁰ For cases involving recoveries for slight impact, see note 92 supra indicating that a slight battery, smoke, and even mere dust have been held to satisfy the impact requirement.

¹⁰¹ The sounder view in the physical injury through psychic cause case seems to be that of Evans, J., in Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 321, 73 So. 205, 207 (1916): “It may be that physical injuries springing out of fright are easily simulated and relief granted in such instances would open the door to fraud and imposture; but this is a matter involving the proof of the case and is addressed rather to the good sense and honesty of purpose of our juries than to the courts.” Gaines, J., in Hill v. Kimball, 76 Tex. 210, 215, 13 S. W. 59 (1890), took a similar position: “It may be more difficult (in the psychic disturbance case) to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had.”

¹⁰² Study Relating to Liability for Injuries Resulting from Fright or Shock, LEG. DOC. NO. 65(E) p. 47 (1936), 1936 REPORT, N. Y. LAW REVISION COM-
It should be noted, however, that a possible public policy argument exists in favor of the impact rule in some jurisdictions which may not exist in others. It is a singular fact that all of the American jurisdictions having a city with a population in excess of one million have the impact rule with the exception of California, and California adopted its rule before Los Angeles became a great city. Inasmuch as "ambulance chasing" with its concomitant evil of fabricated claims is essentially an urban problem, it may well be that courts of the large city jurisdictions have regarded the impact rule as some safeguard against false claims. While it is true that England does not have the impact rule despite the fact that London is one of the greatest world metropolises, England, because of the semi-aristocratic nature of its bar, does not have the "ambulance chasing" problem that large American cities have.

It is submitted that the "ambulance chasing" argument is of very doubtful validity. The impact rule has been so shredded as to be satisfied by the slightest impact, and any disreputable attorney or litigant, if he wishes to falsify a claim, may by perjured testimony prove a slight impact just as easily as no impact at all.

VI. EXCEPTIONS TO THE GENERAL RULE OF NON-LIABILITY

Having examined the New York general rule as laid down in the Mitchell case, it now becomes relevant to discuss the actual state of the New York law at present before pressing on to develop a rationale for the psychic stimuli cases which is consonant with modern medical thought.  

MISSION. The Commission, after analyzing the situation in New York, concluded that Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896), could be best overruled by a statute. It proposed to amend § 37a of Laws of 1909, c. 27 (The General Construction Law) by adding the following subdivision: "Action to recover for injuries resulting from fright or shock. In an action to recover damages for bodily injury or wrongful death hereafter caused, recovery shall not be denied merely because such bodily injury or wrongful death was brought about through fright or shock without physical contact or impact." The amendment was never adopted.

103 Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896); see The Mitchell Case, Part IV supra, for full discussion of it.

104 The rationale is discussed and outlined in The Real Problem—The Question of Evidence, Part VIII infra.
The Mitchell case itself is not truly representative of the present status of the New York view, and, in order to determine how well or how poorly the New York holdings meet the requirements of a sound jurisprudence, it is necessary to discuss the multitude of exceptions to the rule of the Mitchell case.

The New York cases which have arisen since the Mitchell decision are difficult to classify into any consistent pattern; they form a Joseph's coat in which no one constant thread of legal theory is visible. There have been a series of cases allowing and a companion series denying liability for psychic stimuli, and alternately there has been a confirming and a whittling away of the strict rule declared in the Mitchell case.

In considering the broad classifications of cases in which recoveries have been allowed, the following general grouping may be discerned: the burial right cases, the contract relationship cases, the immediate physical injury cases, the slight impact cases, the Workmen's Compensation cases, the food cases, the wilful or wanton injury cases, and the right of privacy cases.

A. The Burial Right Cases

These decisions seem to represent a direct exception to the general rule of no liability for psychic stimuli. It may be that their true rationale for recovery is a relational theory—i.e., the plaintiff has a right to the possession of the corpse for burial purposes; and, that right having been violated, the cause of action is established, and all damages flowing proximately from the cause of action are recoverable. Certain it is that the courts have not always spoken in such clear-cut language, and any such rationale, while perhaps logical, is difficult to deduce from the cases.

In 1896, even before the Mitchell decision, it was held that a wife had a right of action for the dissection of the body of her deceased husband without permission, and

105 Foley v. Phelps, 1 App. Div. 551, 555, 37 N. Y. Supp. 471, 473 (1st Dep't 1896). The court commented: "Irrespective of any claim of property [in the dead body], the right which inhered in the plaintiff as the decedent's widow, and in one sense his nearest relative, was a right to the possession of
later this same right was held to exist in the case of a husband for dissection of his wife's body,\textsuperscript{106} and in a mother for dissection of her son's body.\textsuperscript{107} Apparently such rights are

the body for the purpose of burying it . . . .” For other cases reaching similar conclusions, see note 64 \textit{supra}. On the question of a “property” right in the dead body of a decedent, see note 18 MINN. L. REV. 204 (1934).

Hasselbach v. Mt. Sinai Hospital, 173 App. Div. 89, 159 N. Y. Supp. 376 (1st Dep't 1916), was also an action by a widow for damages by reason of an unauthorized autopsy performed upon her husband's body. The court recognized the principle of Foley v. Phelps, \textit{supra}, and the similar holding in Darcy v. Presbyterian Hospital, 202 N. Y. 259, 95 N. E. 695 (1911), but held that on the facts the defendant hospital was not liable since the autopsy was not performed by its employees or by anyone acting under its direction.

\textsuperscript{106} Jackson v. Savage, 109 App. Div. 556, 96 N. Y. Supp. 366 (1st Dep't 1905). The allegation was that the defendant's autopsy caused this plaintiff great suffering in mind and body, was a great shock to him, and deprived him of his natural right to inter the body of his deceased wife in as perfect a condition as her sickness and the due course of nature that led to her death would permit, and greatly outraged his religious feeling in respect to the mutilation of the corpse of his deceased wife, to his damage in the sum of $25,000. The court held the complaint stated a cause of action on the authority of Foley v. Phelps, \textit{supra} note 105.

\textsuperscript{107} Hassard v. Lehane, 143 App. Div. 424, 425, 128 N. Y. Supp. 161, 162 (1st Dep't 1911). The court followed the line of reasoning in Foley v. Phelps, \textit{supra} note 105, and Jackson v. Savage, \textit{supra} note 106, citing them as controlling authorities. Laughlin, J., stated: “The plaintiff . . . had a legal right to the possession of the corpse of her son in the condition it was in at the instant of death for the purpose of preserving and burying the remains, and without her consent, or statutory authority therefor, no one had a right to deprive her of such possession, or to dissect or otherwise mutilate the body of her son, and the law gives her a cause of action to recover damages, which are measured by the injury to her feelings, caused by the invasion or violation of this right.”

A defense frequently raised in the autopsy cases was relied on in Hassard v. Lehane, \textit{supra}, namely the defense of statutory authority. The statute was held no defense since the defendant was unable to bring himself within its terms. The statute, § 1773, Laws of N. Y. 1882, c. 410, read: “When in the City of New York any person shall die from criminal violence or by a casualty, or suddenly, when in apparent health, or when unattended by a physician, or in prison, or in a suspicious or unusual manner, the coroner shall subpoena one of the coroner's physicians, who shall view the body of such deceased person externally, or make an autopsy thereon as may be required. It shall be the duty of the physician to whom such subpoena is so issued, to make the inspection and autopsy required and to give evidence in relation thereto at the coroner's inquest. The testimony of such physician and that of any other witnesses that the coroner shall find necessary shall constitute an inquest.” The present day statute is much the same. See N. Y. City Charter § 878: “The chief medical examiner shall have such powers and perform such duties as may be provided by law in respect to the bodies of persons dying from criminal violence, by a casualty, by suicide, suddenly when in apparent health, when unattended by a physician, in prison or in any suspicious or unusual manner,” and the \textit{ADMINISTRATIVE CODE} § 878-3.0, “If the cause of such death shall be established beyond a reasonable doubt, the medical examiner in charge shall so report to his office. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by a medical examiner. A detailed description of the findings written during the
not unlimited however, for in an analogous case it has been held that a brother cannot recover for mental suffering caused by the negligence of a cemetery company in permitting the body of a deceased brother to be stolen, because no duty was owed to protect against theft. But recovery was allowed where a steamship passenger died, and the body was embalmed and buried at sea. It was said that the common-law duty of the shipping company was to carry the body to port for delivery to the next-of-kin, and for breach of that duty the decedent's son had an action for mental anguish.

progress of such autopsy and the conclusions therefrom shall thereupon be filed in his office." For a late case construing these provisions, see Trammel v. City of New York, 82 N. Y. S. 2d 762 (Sup. Ct. 1948).

108 Coleman v. St. Michael's Protestant Episcopal Church, 170 App. Div. 658, 659, 155 N. Y. Supp. 1036, 1037 (1st Dep't 1915). The appellate division expressed its view in this fashion: "The complaint does not allege any contract by the defendant corporation to guard and protect the graves in its cemetery; the statute under which the defendant is incorporated and permitted to hold such lands and sell plots therefrom imposes no such duty; and the plaintiff's cause of action, if any, must rest upon some implied duty of any corporation selling lots for burial purposes to protect from theft the graves placed therein. The theft of a dead body is an unusual occurrence. Such a duty would involve a large expenditure of money in order to secure the graves from molestation by outsiders. Without contract obligation to protect these graves, and without statutory duty so to do, it is difficult to conceive any reasonable grounds from which such a duty can be implied. We are referred to no authority, and are able to find none, in which such a duty has been declared to exist, and in our opinion so to hold would cast an unreasonable burden upon such corporation, entirely out of proportion to any compensation that they would be able to charge for the sale of burial plots." In so holding the appellate division reversed the lower court decision. Coleman v. St. Michael's Protestant Episcopal Church, 90 Misc. 118, 153 N. Y. Supp. 445 (Sup. Ct. 1915), which had held that the complaint was sufficient.

On the broad question of the immunities enjoyed by charitable organizations such as the defendant in this case consult Feezer, The Tort Liability of Charities, 77 U. of Pa. L. Rev. 191 (1928).

109 Finley v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715 (1917). But cf. Norton v. Kull, 74 Misc. 476, 132 N. Y. Supp. 387 (App. Term 1911), where recovery for injury to feelings was disallowed. There defendant undertakers contracted to bury the body of plaintiff's husband in a particular cemetery and in the best vacant burial lot and with the best materials, but instead used poor materials and a public grave, so that plaintiff had to rebury at her own expense.

110 Finley v. Atlantic Transport Co., supra note 109 at 257, 115 N. E. at 717. "Under the circumstances and the facts alleged in the complaint a reasonable discharge of the common-law duty required defendant to transport the body to the port of New York and deliver it to the parties entitled to the possession of same for burial." The facts were that after the decedent's death the defendant's employees had had the body embalmed so that there was no danger to passengers or crew from retaining it on board. They carried it for four and one-half days on the ship before suddenly burying it at sea near Nantucket Shoals, only twenty-four hours out of New York, the port of destination.
Later cases indicate no intention to back-track from the relatively consistent allowance of recovery in such cases. In more recent years it has been held that a husband has an action in trespass for damages for mental anguish because of interference with the right of possession of his wife's corpse where cemetery owners moved it to another grave without permission, and that damages for mental anguish are recoverable from a burial association by reason of the loss of the body of a stillborn baby entrusted to it for burial. In another case a hospital was held liable where plaintiff was delivered of the calcified body of a child and unsuccessfully demanded it for burial. There the court made the broad assertion that unlawful invasion of the right

Pound, J., concurred in the result because the allegations of the complaint were to the effect that the body was needlessly and wantonly cast into the sea, in disregard of the feelings of the next-of-kin. However, he felt the holding of the case too broad because "... it cannot be said that under ordinary circumstances the next of kin of a person who dies on shipboard have such a legal right to the possession of the body that they may recover damages because the burial is at sea. A decent committal of the body to the deep in accordance with the custom in such matters ordinarily discharges the duty which the law imposes." Id. at 259, 115 N. E. at 718.

111 Gostowski v. Roman Catholic Church, etc., 262 N. Y. 320, 323, 186 N. E. 798, 799, affirming 237 App. Div. 640, 262 N. Y. Supp. 104 (2d Dep't 1933). Shortly after the funeral the parish priest who supervised the cemetery ordered the body removed to a different grave. When plaintiff discovered the removal he inquired of the priest who in abusive and harsh language indicated to plaintiff that, "You Polish people should be glad to bury any old way. Any place is good enough for you. You have no cemetery of your own. If you don't like the place which is good enough for her and you too, you can go somewhere else and buy a plot."

The husband recovered a jury verdict of $2,000 which was reduced by the Appellate Division to $1,000. The son had also brought an action, but his complaint was dismissed and the dismissal sustained on the theory that only the surviving spouse, whose duty it was to bury the deceased, had the right to sue. The damages awarded were punitive since the jury found that the disinterment was done maliciously and wantonly.

112 Klumbach v. Silver Mount Cemetery Ass'n, 242 App. Div. 843, 275 N. Y. Supp. 180 (2d Dep't 1934), aff'd mem., 268 N. Y. 525, 198 N. E. 386 (1935). The Appellate Division reduced the judgment to $500, and the judgment as so modified was affirmed.

113 Lubin v. Sydenham Hospital, 181 Misc. 870, 42 N. Y. S. 2d 654 (Sup. Ct. 1943). The facts were that plaintiff was delivered by one of defendant's doctors of the calcified body of a child—a so-called "stone baby"—and fifteen days later, upon being discharged from the hospital, plaintiff demanded possession of the body for the purpose of burying, which request was refused. To complicate the case still further, plaintiff died, and the question was whether her death abated the action. The court held that the action survived, relying on the DECEDENT EST. LAW § 119, which in general provides that no cause of action for injury to person or property shall be lost because of the death of the person in whose favor the cause of action existed.
of funeral, interment, or disposition of remains was compensable even though the damages were purely mental.\textsuperscript{114} Two recent cases reaffirm this exception to the general rule, one involving an autopsy on the deceased inmate of a state institution\textsuperscript{115} and the other concerned with a similar autopsy in a city hospital.\textsuperscript{116}

B. The Contract Relationship Cases

A second exception to the strict rule of no recovery lies in the contract relationship cases. There seems to be a direct connection logically between the allowance of recovery here and in the burial right cases. In both there is an underlying right—in one the right to burial and in the other the contract right; and the emotional disturbance, while really the gravamen of the action, can be "tacked on" to something external so that the court does not get the judicially embar-

\textsuperscript{114} "It is well settled that an unlawful invasion of the right of funeral, interment or other lawful disposition of the remains is a tort and is subject of an action for damages." Lubin v. Sydenham Hospital, \textit{supra} note 113 at 871, 42 N. Y. S. 2d at 656. See also 24 C. J. S. § 8, p. 1025 (1941): "It is now well settled that an unlawful invasion or violation of the right to bury a corpse and preserve the remains is a tort, and is the subject of an action for damages." Other New York cases to the same effect are Stahl v. William Necker, Inc., 184 App. Div. 85, 171 N. Y. Supp. 728 (1st Dep't 1918); Apostle v. Pappas, 154 Misc. 497, 277 N. Y. Supp. 400 (Sup. Ct. 1935).

\textsuperscript{115} Gould v. State, 181 Misc. 882, 42 N. Y. S. 2d 357 (Ct. Cl. 1943). This was an action in the Court of Claims. The facts showed that claimant's husband, while an inmate of Rockland State Hospital, met with injuries resulting in his death, shortly following which an autopsy was performed. Upon burial of the deceased, certain of the organs previously removed had not been replaced. Since the claimant was suing as executrix, the court found that the claims for unlawful autopsy and return of certain organs of the decedent's body could not be asserted by her, but the court did grant permission for her to assert these claims individually and to add the decedent's children as parties claimant.

\textsuperscript{116} Beller v. City of New York, 269 App. Div. 642, 58 N. Y. S. 2d 112 (1st Dep't 1945). The Appellate Division reversed the trial court's direction of a verdict for defendant, holding that whether there was an unnecessary mutilation of the decedent's remains and whether the act was unauthorized were both questions for the jury. On the authority of Darcy v. Presbyterian Hospital, 202 N. Y. 259, 95 N. E. 695 (1911), the court reaffirmed per curiam the rule to be as follows: "In the absence of a testamentary disposition, the right to the possession of the body of one who has died belongs to the surviving husband or wife or next of kin for the purpose of preservation and burial. Any one infringing upon such right by mutilating the remains without the consent of the person or persons entitled to the possession thereof may be required to pay damages for the injury to the feelings and for mental suffering resulting from such unlawful act, even though no pecuniary damage is alleged or proved." Beller v. City of N. Y., \textit{supra} at 643, 58 N. Y. S. 2d at 113.
rassing feeling that it is allowing recovery for psychic stimulus alone.

Thus, recovery for abusive language and insulting conduct by employees of a carrier towards a passenger has been allowed, and ejecting a patron without cause may create liability for mental anguish on the part of the proprietor of a public resort even though there is no impact. Similarly,

---

117 Gillespie v. Brooklyn Heights R. R., 178 N. Y. 347, 70 N. E. 857 (1904). The case was one of particularly insolent activity by the defendant's conductor. It appeared that the plaintiff, a woman doctor, tendered the conductor a quarter of a dollar which was more than the exact fare, and asked for a transfer. After the conductor had attended to another passenger, the plaintiff demanded her change, whereupon the conductor denied having received any amount in excess of her fare. In an abusive and impudent manner, the conductor not only refused to return the change but grossly insulted the plaintiff by calling her a "dead beat" and a "swindler." A fellow passenger informed the conductor that plaintiff's story was true, but he continued his tirade.

The court through Martin, J. (the same jurist who laid down the general rule of no recovery in the Mitchell case), held that plaintiff could recover. The court cited favorably the rule in Booth, Street Railways § 372 to the effect that "The contract on the part of the company is to safely carry its passengers and to compensate them for all unlawful and tortious injuries inflicted by its servants. It calls for safe carriage, for safe and respectful treatment from the carrier's servants, and for immunity from assaults by them, or by other persons if it can be prevented by them. No matter what the motive is which incites the servant of the carrier to commit an improper act towards the passenger during the existence of the relation, the master is liable for the act and its natural and legitimate consequences. Hence, it is responsible for the insulting conduct of its servants, which stops short of actual violence." Gillespie v. Brooklyn Heights R. R., supra at 353, 70 N. E. at 859.

As to the damages involved, the court was of the opinion that "... the elements of compensatory damages for such an injury are the humiliation and injury to her feelings which the plaintiff suffered by reason of the insulting and abusive language and treatment she received, not, however, including any injury to her character resulting therefrom. She was entitled to recover only such compensatory damages as she sustained by reason of the humiliation and injury to her feelings, not including punitive or exemplary damages." Id. at 359, 70 N. E. at 861.

The majority American position is in accord with New York on this point. See May v. Shreveport Traction Co., 127 La. 420, 53 So. 671 (1910) (recovery allowed for attempt to put plaintiff in "Jim Crow" car); Lamson v. Great Northern R. R., 114 Minn. 182, 130 N. W. 945 (1911) (recovery allowed for insult to passenger); Humphrey v. Michigan Rys., 166 Mich. 645, 132 N. W. 447 (1911) (recovery allowed for abusive argument over fare). The Restatement takes the same view, Restatement, Torts § 48 (1934), set out in note 31 supra.

118 Aaron v. Ward, 203 N. Y. 351, 96 N. E. 736 (1911). The plaintiff purchased her ticket and took her position in a line of the defendant's patrons leading to a window at which the ticket entitled her to receive a key admitting her to a bathhouse. When she approached the window a dispute arose between her and the defendant's employees as to the right of another person not in the line to have a key given to him in advance of the plaintiff. As a result of this dispute plaintiff was ejected from the defendant's premises, the agents of the
humiliation and shame suffered by a hotel patron because of insults of employees is compensable because the contract relation of the parties entitled the guest as a legal right to respectful and decent treatment.\textsuperscript{119} The same rationale has

latter refusing to furnish her with the accommodations for which she had contracted.

The plaintiff was awarded damages for $250, the court overruling the defendant's contention that her recovery could only be for the price of the ticket. The court held "... there is a distinction between common carriers and innkeepers, who are obliged to serve all persons who seek accommodation from them, and the keepers of public places of amusement or resort, such as the bathhouse of the defendant, theaters and the like. That the distinction exists is undeniable, and in the absence of legislation the keeper of such an establishment may discriminate and serve whom he pleases. Therefore, in such a case a refusal would give no cause of action. So, also, it is the general rule of law that a ticket for admission to a place of public amusement is but a license and revocable. ... But granting both propositions, that the defendant might have refused the plaintiff a bath ticket and access to his premises, and that even after selling her a ticket he might have revoked the license to use the premises for the purpose of bathing, which the ticket imported, neither proposition necessarily determines that the plaintiff was not entitled to recover damages for the indignity inflicted upon her by the revocation." Aaron v. Ward, supra at 355, 96 N. E. at 737. The court then went on to hold that "... the defendant having voluntarily entered into a contract with her admitting her to the premises and agreeing to afford facilities for bathing, her status became similar to that of a passenger of a common carrier or a guest of an innkeeper, and in case of her improper expulsion she should be entitled to the same measure of damages as obtains in actions against carriers or innkeepers when brought for breach of their contracts." Id. at 357, 96 N. E. at 738.

Other states have tended to agree with the New York position and allowed damages for insulting and abusive treatment by possessors of land who hold such land open for public purposes. See Weber-Stair Co. v. Fisher, 119 S. W. 195 (Ky. 1909) (applying rule to theater); Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S. W. 692 (1916) (applying rule to circus); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209 (1904) (applying rule to amusement park).

Another New York case on the same question is Smith v. Leo, 92 Hun 242, 36 N. Y. Supp. 949 (Sup. Ct. 1895) (applying the rule to a dancing school). The Restatement straddles the problem with a caveat, "The Institute expresses no opinion as to whether the rule stated in this Section [allowing recovery for insulting conduct] is not also applicable to public utilities other than common carriers and to the possessors of land who for their business purposes hold it open as a place of public resort." Restatement, Torts § 48 (1934).

\textsuperscript{119} De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527 (1908). It appeared that plaintiff, in company with her daughter and her brother, called at the defendant's Grand Union Hotel in New York City and applied for rooms, explaining the family relationship. The plaintiff was assigned a room, and about one o'clock in the morning one of the defendant's employees, in the course of his regular employment, forced his way into plaintiff's room despite her protests. She was then wearing only a night gown. In the presence of several persons the defendant's servant charged plaintiff with being a disreputable person and occupying the room for improper purposes. The plaintiff was ordered to leave the hotel and threatened with the publication of her name in the daily papers as a disreputable person.
been applied to allow recovery by negro guests against a hotel-restaurant corporation which refused them service.\textsuperscript{120}

It is not every contract relationship that will entitle one to recover. Where plaintiff's photograph of his deceased mother was damaged by defendants who had been entrusted with it for purposes of reproduction, plaintiff could not recover for physical and mental anguish caused by the mutilation.\textsuperscript{121} The court (a trial court) went further than it needed to decide the case, and made rather sweeping statements to the effect that an injury to feelings, independently and alone, apart from corporeal or personal injury, is not in any judicial sense a natural and proximate consequence of the negligent act, and that mental suffering resulting from breach of contract is not the subject of compensation in

While admitting that a hotelkeeper must necessarily have access to the rooms of the guests for purposes of fulfilling his contract to furnish convenience and comfort, the court pointed out that such entries must be made with due regard to the occasion and in such manner as is consistent with the rights of the guest. "One of the things which a guest for hire at a public inn has the right to insist upon is respectful and decent treatment at the hands of the innkeeper and his servants. That is an essential part of the contract whether it is express or implied." De Wolf v. Ford, supra at 404, 86 N. E. at 530.

The court held the action would lie and that the damages would include injury to feelings and personal humiliation. The judges seemed quite incensed at the actions of defendant's servant, pointing out indignantly "... the servant of the defendants forced his way into the plaintiff's room under conditions which would have caused any woman, except the most shameless harlot, a degree of humiliation and suffering that only a pure and modest woman can properly describe." Id. at 405, 86 N. E. at 531.


\textsuperscript{120} Odom v. East Avenue Corp., 178 Misc. 363, 34 N. Y. S. 2d 312 (Sup. Ct. 1942), aff'd mem., 264 App. Div. 985, 37 N. Y. S. 2d 491 (4th Dep't 1942). Plaintiffs were guests in defendant's hotel. They went to the dining room of the hotel and were denied service, in the presence of a number of other people, on the ground that they were of the colored race. The court held that the plaintiffs had a common law cause of action for breach of the defendant's duty as an innkeeper and also an action to recover the statutory penalty under the NEW YORK CIVIL RIGHTS LAW §§ 40, 41.

\textsuperscript{121} Furlan v. Rayan Photo Works, 171 Misc. 839, 12 N. Y. S. 2d 921 (Munic. Ct. 1939). The recovery was limited to nominal damages in the sum of five dollars.
The true situation seems to be that it depends on the facts of the particular situation—the "stomach reaction" of the court to the type of mental anguish caused and the type of contract relationship existing. For example, where the stimulus was shame and mental anguish resulting from a charge of immorality and the wrong was a simultaneous trespass on the right to possession of a hotel room, it was held that recovery could be had. This was one of the not unfamiliar cases in which overzealous hotel authorities erroneously charged guests who were husband and wife with being unmarried and occupying a room for immoral purposes. The case suggests that where there is the special contract relationship a different duty is owed than there would be to a stranger, and conduct which would not otherwise confer a right of action may do so as to the guest. The breach of the special duty provides a primary cause of action to which the court will allow the tacking on of "parasitic" damages for mental anguish or injury by fright.

122 The court quoted approvingly from Curtin v. Western Union Tel. Co., 13 App. Div. 253, 256, 42 N. Y. Supp. 1109, 1111 (1st Dep't 1897), to the effect that "'An injury to the feelings, independently and alone, is something too vague to enter into the domain of pecuniary damages—too elusive to be left, in assessing compensation therefor, to the discretion of a jury. The extent and intensity of such injuries depend largely upon individual temperament and physical, mental, and nervous conditions. These conditions are shadowy, unequal, and uncertain in the extreme. When they exist, in connection with physical injuries, they can be examined and tested. Existing alone and independently, they are easily simulated, and the simulation is hard to detect. . . . there is no certain means whereby such mental pain can be fairly and accurately compensated.'" Furlan v. Photo Works, supra note 121 at 841, 12 N. Y. S. 2d at 924.


124 The case was a particularly flagrant one. The defendant's servant forced his way into the room occupied by plaintiff and her husband, and addressed insulting and abusive language to plaintiff. The hotel authorities also caused the arrest of the husband and his removal from the hotel. Plaintiff claimed both for mental anguish and for physical disturbance consisting of weakness, pains, loss of appetite, and difficulty in sleeping.

125 "The acts of the servant were violative of its (the defendant corporation's) obligation to refrain and to use reasonable care that its servant refrained from unreasonably interfering with the privacy of the plaintiff in the room assigned to her and from abusing or insulting her or indulging in any conduct or speech that might necessarily bring upon her physical discomfort or distress of mind." Boyce v. Greeley Square Hotel Co., supra note 123 at 109, 126 N. E. at 648.

126 In this connection see Restatement, Torts § 47(b) (1934): "if the actor has by his tortious conduct become liable for an invasion of any legally
Examples of actions in which the courts have not reacted favorably to the allowance of damages even though there was a basic underlying contract are seen in many fields of endeavor. It has been held that there is no recovery for grief and mental anguish caused by negligent delay in delivering a message of death or illness, though defendant had reason to know of the character of the message, and, where defen-

protected interest of another, emotional distress caused by the invasion or by the tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other.”

The main question in Boyce v. Greeley Square Hotel Co., supra note 123, was that of damages. The plaintiff alleged both physical and mental injuries, and the court held that recovery for both was possible. “The injury to her feelings and her mental distress and anguish, at least, flowed directly and naturally from the wrongs committed by the defendant. The physical ills, which were caused by the wrongs or were direct effects of the mental distress and anguish, were likewise sources of damage for which the defendant must compensate the plaintiff. They were in a direct and uninterfered with line of causation.” Boyce v. Greeley Square Hotel Co., supra note 123 at 112, 126 N. E. at 650. Cf. Mitchell v. Rochester Ry., 151 N. Y. 107, 110, 45 N. E. 354, 355 (1896), where the court said of physical injuries flowing from mental stimuli, “It cannot be properly said that the plaintiff’s miscarriage was the proximate result of defendant’s negligence. . . . The plaintiff’s injuries do not fall within the rule as to proximate damages.”

127 Curtin v. Western Union Tel. Co., supra note 122. Plaintiff’s brother in St. Louis, Missouri, sent a telegram to plaintiff in New York announcing the death of another brother. The telegram was delivered four days late. Barrett, J., referring to the Mitchell case, supra note 126, found that “The principle of this case is a fortiori applicable here. The plaintiff’s recovery rests solely upon the defendant’s negligence in the performance of a duty which it owed to her as the ‘addressee’ of the telegram. . . . The contract was made in St. Louis, Missouri, with the plaintiff’s brother. He was the sender of the dispatch, and he there paid for the service. There certainly could be no recovery for mental distress occasioned by a breach of that contract.” Curtin v. Western Union Tel. Co., supra at 254, 42 N. Y. Supp. at 1110. It may be argued that, strictly speaking, the Curtin case is not a contract relationship case because plaintiff, as the mere addressee of the telegram, could hardly be called in privity with the parties to the contract of transmission. However, it is included under the discussion of the contract relationship exception because of the obvious kinship to the true contract situation.

The majority rule in the telegraph cases takes the same position as the Curtin decision. Western Union Tel. Co. v. Speight, 254 U. S. 17 (1920); Western Union Tel. Co. v. Chouteau, 28 Okla. 664, 115 Pac. 879 (1911); Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078 (1894); Morton v. Western Union Tel. Co., 53 Ohio St. 431, 41 N. E. 689 (1895). A few states do permit recovery for mental anguish in such cases. Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1 (1895); Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574 (1888); Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930).

Telegraph cases disallowing recovery have sometimes called on the authority of Mitchell v. Rochester Ry., supra note 126. Thus in Jones v. Western Union Tel. Co., 233 Fed. 301 (1916), the Federal District Court of the Southern District of California cited the Mitchell case approvingly and denied recovery for obvious negligence by the telegraph company. There the message as sent
dant undertakers contracted to bury the body of plaintiff's husband in a particular cemetery and in the best vacant burial lot to be had and with the best materials, but instead used poor materials and a public grave, so that plaintiff had to rebury at her own expense, there could be no recovery for injury to her feelings.\footnote{Late holdings on the question seems to be tending toward limitation of the right of recovery in contract relationship cases. Thus, a parent's complaint against a hospital and doctor for mental pain and suffering resulting from negligence in reporting that a male child was female did not state a cause of action;\footnote{Kaufman v. Israel Zion Hosp., 183 Misc. 714, 715, 51 N. Y. S. 2d 412, 413 (1944). Daly, J., was of the view that "... it is settled by a long line of cases in this State that in the absence of accompanying physical or corporeal injury there can be no recovery for mental suffering or the consequences of such disturbance resulting from a negligent or careless act, as distinguished from one that is willful." [Citing inter alia Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896); Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931).] The complaint as drawn in the case was a "catch-all" pleading, alleging "physical and mental pain and suffering" resulting from "carelessness, negligence and breach of contract," but was nonetheless held insufficient.} and in a tenant's cross-action for injuries against the landlord because of vermin in rented premises, it was held error to admit testimony as to expenditures of the tenant for medical attention for treatment for an alleged nervous condition in view of the lack of physical contact.\footnote{Coronal Realty Corp. v. Smith, 187 Misc. 401, 402, 63 N. Y. S. 2d 684, 685 (Sup. Ct. 1946). The opinion of the appellate term was per curiam,} Similarly, no recovery for mental anguish could be read "Norman died this A. M., will be buried to-morrow," and, as delivered, read "Father died this morning, will be buried tomorrow." Similar sanction for the Mitchell case was Western Union Tel. Co. v. Sklar, 126 Fed. 295, 301 (C. C. A. 6th 1903), which cited the Mitchell holding and went on to decide that "Damages for mental pain, grief, disappointment, etc., are recoverable at the common law only when the inseparable accompaniment and result of some bodily pain." In that case the death message was delayed in transmission so that the remains of the decedent were interred without plaintiff's having an opportunity to view the body.

\footnote{Norton v. Kull, 74 Misc. 476, 132 N. Y. Supp. 387 (Sup. Ct. 1911). The appellate term was of the opinion that plaintiff's damage was limited to "... such an amount as will repay for the money loss she has suffered because of the failure of the defendant to do as he agreed. In actions of this nature injuries to the feelings are not to be considered." Norton v. Kull, supra at 477, 132 N. Y. Supp. at 388. Query whether this case is still good law in view of the recent substantial development of the "burial right" theory? See Finley v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715 (1917); Gostkowski v. Roman Catholic Church, etc., 262 N. Y. 320, 186 N. E. 798 (1933), and cases discussed in notes 110-116 supra.}
had by a plaintiff who discovered upon arrival at a hotel that his previously reserved room had been assigned to another guest.\textsuperscript{131}

\section*{C. The Immediate Physical Injury Cases}

Another exception engrafted on the rule of non-liability is exemplified by the case where recovery was allowed to a plaintiff who suffered immediate personal injury by leaping from defendant’s horse car in order to avoid the anticipated danger of being struck by an express train.\textsuperscript{132} In this line of cases there exists a psychic stimulus producing a startle reaction on an automatic level resulting directly and immediately in a physical injury from without. Another early case involving the injury through fright of a child who was steal-

\begin{itemize}
\item\textsuperscript{131} Kellogg v. Commodore Hotel, 187 Misc. 319, 64 N. Y. S. 2d 131 (Sup. Ct. 1946). As a result of correspondence plaintiff contracted with defendant for defendant to furnish lodging for three days. Plaintiff alleged $5,000 damage by reason of the cancellation of his reservation and further alleged that he was upset in both mind and body by waiting around the hotel lobby for more than an hour, trying to straighten things out and to obtain lodgings elsewhere.

The court struck out the allegations concerning injuries to plaintiff’s nerves, and, in an excellent illustration of the important effect of extrinsic national policy factors, remarked: “We are compelled to interpret the law relative to innkeeper and guest, as it has been handed down over a period of four hundred years, reasonably, as applied to the very unusual conditions existing during and since the late war. . . . Would it not be contrary to both good conscience and public policy to recognize a cause of action for injury to nerves and depression to all persons who found, because of emergency or other unusual conditions, the hotel proprietor could not deliver a room previously assigned?” Kellogg v. Commodore Hotel, \textit{supra} at 327, 328, 64 N. Y. S. 2d at 138.

\item\textsuperscript{132} Twomley v. C. P. N. & E. R. R. R., 69 N. Y. 158 (1877). Plaintiff was a passenger in defendant’s horse car which was negligently driven almost in front of an express train. In fact the horse car succeeded in getting across the tracks in time, but plaintiff, leaping from it to avoid the danger, was injured. Despite the fact that plaintiff’s injury was the result of the physical consequences of a psychic stimulus, recovery was allowed. The court felt that “. . . the plaintiff was placed by the reckless or careless act of . . . the defendant, in such a position as compelled her to choose upon the instant, and in the face of an apparently great and impending peril, between two hazards, a dangerous leap from the moving car, or to remain in the car at certain peril.” Twomley v. C. P. N. & E. R. R. R., \textit{supra} at 160. The court went on to conclude that plaintiff’s action was reasonable and that her injuries were the result of defendant’s negligent conduct.
\end{itemize}
ing a ride on a street car also resulted in a plaintiff's verdict. 133

In many immediate physical injury cases the court had occasion to distinguish away the Mitchell case. 134 For instance, where plaintiff was injured in the rush of persons fleeing from a building in which defendant had negligently caused a panic, the court permitted recovery 135 and said of the Mitchell decision: "I think the court in that case meant to discourage actions for damages for fright alone, and to apply it too closely in a case like this would work injustice." 136

Another excellent illustration of the immediate physical injury exception occurred in an appellate division case just prior to the first World War. 137 There a mother saw her small children going up in an apartment house elevator without an operator, and the fright caused her to faint, so that she fell through an open door of the shaft and was injured. 138 In allowing recovery the court rejected a dictum of a famous English case 139 to the effect that fear must be of immediate

133 Ansteth v. B. R. R., 145 N. Y. 210, 39 N. E. 708 (1895). Plaintiff, a boy of ten, was stealing a ride on the front platform of defendant's street railroad car. The conductor reached out towards plaintiff with his hand and cried "hey," whereupon plaintiff let go his grip and fell, the car crushing one of his legs. The court said that plaintiff was a trespasser, but still defendant's servant had no right to frighten him off while the car was in motion.

134 See notes 135, 149, 152, 154 infra.

135 Schachter v. Interborough R. T. Co., 70 Misc. 558, 127 N. Y. Supp. 308 (Sup. Ct. 1911), rev'd on other grounds, 146 App. Div. 139, 130 N. Y. Supp. 549 (1st Dep't 1911). A loud explosion, caused by the negligence of defendant railroad, accompanied the passage of a train on an elevated road near the windows of a building where girls were working. The explosion shook the building and was attended by flame and smoke. Frightened, the girls rushed panic-stricken for the stairway, trampling upon and injuring plaintiff. In distinguishing the Mitchell case, and allowing recovery, the court remarked: "I do not think the case of Mitchell v. Rochester Ry., 151 N. Y. 107, is controlling in this case. There the plaintiff while waiting for a car was suddenly confronted with a dangerous situation and fainted, the fall and shock causing a miscarriage. There was no physical contact nor any combination of circumstances which inflicted violent bodily injuries. That case was decided upon public policy and because it was the result of an accidental and unusual combination of circumstances." Schachter v. Interborough R. T. Co., supra at 560, 561, 127 N. Y. Supp. at 310.

136 Ibid.


138 It appeared that the elevator operator was responsible for leaving open the door which gave entrance to the shaft.

personal injury to oneself and went on to rationalize in this way: since defendant had created a frightening stimulus, and plaintiff had reacted spontaneously and virtually automatically in a not unforeseeable manner, fainting or in some other way receiving injury "from without," it was just for plaintiff to recover for the physical injuries plus the shock and fright.

In a case four years later, a similar holding was made where it appeared that defendant's railway car arose above the tracks and came down with a severe jolt, shocking plaintiff's nervous system and causing hemorrhage and incomplete abortion. The appellate term did not choose to rest its holding upon the physical contact which could have readily been spelled out, but chose to hold that if the physical injuries complained of were the immediate result of a nervous shock produced by the operation of defendant's railroad then that alone would constitute a prima facie case for plaintiff. The court cited with approval the elevator case discussed

---

140 The English courts have now gone far beyond the restrictive view that to allow recovery fear must be of immediate personal injury to oneself. See, e.g., Owens v. Liverpool Corp., [1939] 1 K. B. 394, holding that fear for the safety of a coffin containing a deceased relative will allow recovery where mental distress results.

141 Briefly summarized, the holding was to this effect: "For fright alone, unconnected with physical injury it is true that no recovery can be had, but when the fright results in an actual physical injury a different rule prevails." [Citing Jones v. Brooklyn Heights R. R., 23 App. Div. 141, 48 N. Y. Supp. 914 (2d Dep't 1897), and Wood v. N. Y. Central & H. R. R. R., 83 App. Div. 604, 82 N. Y. Supp. 160 (4th Dep't 1903), aff'd mem., 179 N. Y. 557, 71 N. E. 1142 (1904).]

McLaughlin, J., dissented in a 4 to 1 holding on the authority of the Mitchell case, supra note 126. "Defendant owed plaintiff no duty to protect her from fright or from fainting by reason of it. The defendant was not bound to anticipate that the plaintiff, upon seeing her children going up in the car without an operator, would faint, and by reason thereof fall and sustain the injuries which she did." Cohn v. Ansonia Realty Co., supra note 137 at 794, 148 N. Y. Supp. at 41.


143 As to the improbability of spontaneous abortion being in fact induced by trauma or psychic disturbance, see Hertig and Sheldon, Minimum Criteria Required to Prove Prima Facie Case of Traumatic Abortion or Miscarriage, 117 ANN. SURG. 596 (1943), dsscussed in note 258 infra.

144 "If it appeared, when plaintiff rested, that the physical injuries complained of were the result of a shock produced by the negligent operation of defendant's railroad, a prima facie case would have been made out." Pareti v. New York Rys., 172 N. Y. Supp. 388, 389 (1918).
above, and did not at any time seek a concurrent physical injury in the form of contact or impact.

Shortly thereafter a case of the same type arose. It appeared that the female plaintiff was standing with one hand resting on the wall of an elevator shaft in defendant’s apartment house waiting for the elevator when a one hundred fifty pound door fell from the fifth floor to the bottom of the shaft. The fall of the door, the noise and vibration caused the plaintiff to lose her balance and fall, resulting in a miscarriage. Again the court did not choose to distinguish the Mitchell case on the ground that here there was physical disturbance of plaintiff’s support, but instead preferred the distinction that there was immediate personal injury. The court pointed out that the plaintiff sought recovery not for fright or physical ailments resulting from fright, but for physical injuries to her person which were the natural and immediate result of defendant’s negligence. The court stressed the difference between physical ailments due

---

146 The type of testimony in the case is worth noting as typical of the evidence in these actions. Plaintiff testified that after she boarded the car she stood outside on the platform, “because I could not stay in the car, I had a stomach”; that when the car turned into a particular street, “It switched like an automobile, and the car jumped up, and I held myself on the railing; and I went on the other side, just a little bit, and the car jumped up, and the whole frame of the window fell right in back of me; and then I went inside of the car—I went and sat down. The conductor asked me if I got hurted. I said, ‘No, I got shocked.’” From the character of the testimony, it seems reasonably certain that the court could have with little difficulty constructed an “impact.” However, it did not see fit to do so, preferring rather to declare under the immediate physical injury exception of the Cohn case, supra note 145.
148 It was, however, pointed out that there was “... testimony by plaintiff that her fall was the result of the physical disturbance of her support, caused by the fall of the door. ...” Id. at 469, 170 N. Y. Supp. at 994. The court neither stressed nor relied on this possible impact, but instead commented that “No case is presented for a charge to the jury that if fright caused the plaintiff to fall she cannot recover.” Id. at 470, 170 N. Y. Supp. at 995.
149 Blackmar, J.: “In the Mitchell case, where the doctrine is enunciated and laid down, it is limited to cases ‘where there is no immediate personal injury.’ Obviously the fall of the elevator door caused the injury; and the Cohn (supra note 141) and Wood (supra note 141) cases ... are authority that the chain of cause and effect is not broken because one link is the present effect upon the mind and nerves of the plaintiff without trespass on her person.” Ibid.
to fright and actual physical injuries and especially the immediacy of the harm.\textsuperscript{150}

A decade later another case\textsuperscript{151} held exactly the same way where plaintiff, frightened by defendant’s runaway horse and seeking to avoid injury, turned sharply and broke his leg.\textsuperscript{152}

Finally, in 1931, a case of the immediate injury type reached the Court of Appeals.\textsuperscript{153} It appeared that plaintiff was slightly shaken by defendant’s car bumping against her husband’s parked auto. The jar was trivial, but the plaintiff got out of the car in a very excited condition to see if any damage had been done. While writing down defendant’s license number the plaintiff fainted and fell, fracturing her skull and dying in a matter of a few minutes. The court allowed recovery, indicating that the only reason for ever denying recovery in such psychic stimuli cases is the fear of fabrication of evidence,\textsuperscript{154} and that such fear is never present when

\textsuperscript{150} “The claim of the plaintiff is not to recover damages for fright or physical ailments due to fright, but for the physical injuries to her person which were the natural immediate result of defendant’s negligence.” \textit{Id.} at 470, 170 N. Y. Supp. at 996.


\textsuperscript{152} The court distinguished the \textit{Mitchell} case: “But the distinction is apparent. Plaintiff’s condition there was induced solely by fright without any immediate personal injury. Here plaintiff does not claim damages for a condition directly caused by any consequent upon fright, but for the fracture of his leg which was not the result of mere fright but may have been due either to contact with the horse or to his effort to avoid being struck by it.

“Under such circumstances though he were actually frightened, and that state of mind impelled him to attempt to escape the impending danger, he may recover damages.” \textit{Id.} at 318, 241 N. Y. Supp. at 161. Cf. \textit{Ansteth v. B. R. Co.}, 145 N. Y. 210, 39 N. E. 708 (1895).

\textsuperscript{153} Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931). It is possible also to view this case as within the “slight impact” exception, since there was a very trivial impact involved. It is believed, however, that a more functional classification is to put it in the “immediate injury” grouping, since the court seems to regard the immediacy of the harm, and the consequent safeguard against fabrication, as the most important factor.

\textsuperscript{154} Lehman, J.: “In the case of \textit{Mitchell v. Rochester Ry. Co.} and \textit{Spade v. Lynn & Boston R. R. Co.} [\textit{infra}] the courts decided that for practical reasons there is ordinarily no duty to exercise care to avoid causing mental disturbance, and no legal right to mental security. . . . The conclusion is fortified by the practical consideration that where there has been no physical contact there is danger that fictitious claims may be fabricated. Therefore, where no wrong was claimed other than a mental disturbance, the courts refused to sanction a recovery for the consequences of that disturbance.” Comstock v. Wilson, \textit{supra} note 153 at 238, 239, 177 N. E. at 433.

Mr. Justice Holmes in \textit{Spade v. Lynn & Boston R. R.}, 168 Mass. 285, 288, 47 N. E. 88 (1897), based his decision denying recovery on the same public policy consideration of preventing fabricated claims, saying of the no-
the injury occurs on the spur of the moment right after the accident. The court does mention the matter of the impact, saying “The collision itself, the consequent jar to the passengers in the car, was a battery and an invasion of their legal right. Their cause of action is complete when they suffered consequent damages,” but it is clear that the holding rests on the court’s belief that the only social policy which can prevent recovery in such cases, fear of fabrication of damages, is not applicable because of the immediacy of the harm.

A very similar case had been, surprisingly enough, decided exactly the opposite way just four years prior in the appellate division. In that case plaintiff was a passenger in an auto with which defendant’s truck negligently collided, causing a slight impact. It appeared according to plaintiff’s evidence that the chassis received a “good bump” and that plaintiff “thought we were going to be crushed and I was badly frightened.” The damage was a miscarriage allegedly caused by the fright. The court said that a physical impact was required to sustain the action and refused to ac-

---

liability rule, “As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents recovery for visible illness resulting from nervous shock alone.”

156 Comstock v. Wilson, supra note 153 at 239, 177 N. E. at 434.

157 It would seem that the Comstock case commits the New York courts to the view that the only argument of validity in the Mitchell case is the public policy one—the fear of fabrication of claims. Typical of the appraisal of the Comstock case in these terms is Bohlen & Polikoff, Liability in New York for the Physical Consequences of Emotional Disturbance, 32 Col. L. Rev. 409, 417 (1932): “It may be said with some confidence that Comstock v. Wilson does recognize that the only reason for denying recovery is fear of fabricated claims. Therefore, it may be predicated that recovery will be allowed in situations where the defendant’s act is negligent as threatening physical harm to the plaintiff and the plaintiff sustains physical harm through the immediate effect upon him of fright caused by the peril to which he is exposed, if such effects are external and apparent and, therefore, susceptible of proof by those present at the time—not gradual, internal and susceptible of proof only by expert testimony. Furthermore, it may be safely said that the opinion of Judge Lehman, concurred in by all the other judges of the court, leaves little doubt that no distinction will be made between physical effects of shock resulting from the actionable injury, and like effects of shock concurrent with actionable injury and produced by the wrong which causes the actionable injury.”


159 Id. at 465, 221 N. Y. Supp. at 622.
cept the trivial impact as enough to warrant a recovery for plaintiff's damages.150

The immediate injury exception also applies to injuries to animals, though not, of course, on the same rationale since even the most conservative New York court would hardly find it necessary to protect against the falsification of claims by animals.150 The important consideration in the animal cases is to have some way of telling that the injury actually was caused by fright. Thus, where a horse burst a blood vessel immediately after being frightened due to defendant's negligence, it was held that this consideration was satisfied and recovery was allowed.161 A later case, however, denied recovery for injuries to the psychic equipment of a horse by fright induced through sight of defendant's formidable Stanley Steamer.
In summary it may be stated that if, as seems to be the case, the only meritorious argument against recovery for the effects of fright or shock is that to permit the action would facilitate prosecution of fabricated claims, then the immediate injury exception is a proper one. Since the injury is immediate and therefore presumably unfeigned, there can be little fear of fabrication.\textsuperscript{163}

D. \textit{The Slight Impact Cases}

Closely allied to the immediate injury exception are the slight impact cases. The latter represent a path the New York courts have found to allow recovery for stimuli which, factually speaking, are purely psychic, but which are surrounded by a concomitant battery of some slight nature. This gives the court the opportunity to do equity but at the same time to “save face” by giving lip service to the impact rule.

Just as the immediate injury exception, the slight impact exception is grounded in the phrase in the \textit{Mitchell} case to the effect that “... no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.”\textsuperscript{164} By turning that phrase around, it is easy enough to reason that recovery can be had where there is an immediate injury, which

\footnotesize{combustion chamber, extends to the top of the canopy in the rear. There are sinuations in the stacks through which the escaping vapor and the exhaust steam pass, and the design is that the exhaust steam shall be condensed inside the stack.” \textit{Id.} at 585, 65 N. Y. Supp. at 65. \textit{Cf.} the amusing case of \textit{Scribner v. Kelly}, 38 Barb. 14 (N. Y. 1862), where recovery was denied for an injury caused by the fright of the plaintiff’s horse at the sight of an elephant of the defendant’s on a highway. The court concluded that “The injury which resulted from his (the horse’s) fright is more fairly attributable to a lack of ordinary courage and discipline in himself, than to the fact that the object which he saw was an elephant.”}

\footnotesize{In both the \textit{Mason} and \textit{Scribner} cases the courts evidently felt that the situations were simply \textit{damnnum absque injuria}.}

\textsuperscript{163}Bohlen & Polikoff in \textit{Liability in New York for the Physical Consequences of Emotional Disturbance}, 32 Col. L. Rev. 409, 416 (1932), express the opinion that “It is practically impossible to fabricate on the spur of the moment a fainting spell merely to create a future right of action for injuries not yet received. (Referring to the immediate injuries from fainting in the \textit{Cohn} and \textit{Comstock} cases.) The result of the fainting was an immediate and clearly perceptible injury. The whole incident denies the possibility of fabrication.”

\textsuperscript{164}Mitchell v. Rochester Ry., 151 N. Y. 107, 110, 45 N. E. 354 (1896).
can mean either an injury from "without" as in the true immediate injury exception or an injury from the defendant himself as in the slight impact exception.

By a process of evolution the relationship which the slight impact must bear to the fright or its consequences has come to be this: it need not be a cause at all, so long as its presence is shown. If it be shown that some slight battery or contact was coincident in point of time with the fright, recovery will be allowed for the injuries resulting from the fright without inquiry as to whether these injuries were caused by the concurrence of fright and injury or by fright alone. A Missouri court has well characterized this exception:

... the courts which deny relief for injuries following fright, are so impressed with the injustice of the rule that they seize on any pretext to allow a recovery even the most frivolous legal wrong and however slight the immediate harm may be. A Missouri court has well characterized this exception:

It is not necessary that the injury be upon the surface of the body; a small internal injury will suffice.

But, though the courts have often given recovery in slight impact cases, they have not always in the past gone

---

165 Thus the statement of Judge Lehman in Comstock v. Wilson, 257 N. Y. 231, 235, 177 N. E. 431, 433 (1931), "The courts in such case attempt no differentiation between the direct physical injury caused by the impact and the damage caused by the fright, even where the fright preceded the impact. ... [quoting Mr. Justice Holmes in Homans v. Boston Elev. R. R., 180 Mass. 456, 62 N. E. 737 (1902)] 'But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it.'"

166 Hickey v. Welch, 91 Mo. App. 4, 12 (1901). This remark coming from a Missouri court is somewhat startling inasmuch as Missouri, like New York, follows the minority rule and denies liability in the psychic injury cases. See note 40 supra.

167 No New York cases have considered this precise question, but there seems no reason to suppose that New York would not follow the Massachusetts cases which have held internal injury sufficient. See Steverman v. Boston Elev. R. R., 205 Mass. 508, 91 N. E. 919 (1910).

168 See Jones v. Brooklyn Heights R. R., 23 App. Div. 141, 48 N. Y. Supp. 914 (2d Dep't 1897). Plaintiff, five months pregnant, was struck on the temple by a small incandescent light bulb which fell from a lamp attached to the roof of one of defendant's cars in which plaintiff was riding. There was conflict in testimony as to whether the bulb also struck her abdomen. Plaintiff was immediately taken ill, confined for the most part to bed, and miscarried three weeks later. The court distinguished the Mitchell case: "In that case there was no physical injury and no physical contact with the person of the plaintiff;
such injury as was sustained arose solely from fright. The court held that mere fright, disassociated from physical injury, would not create a cause of action. The court so charged in the present case. An injury, however, sufficiently severe to produce shock, or which, in fact, produces a shock, presents an entirely different question. Shock is not fright; the latter may be a producing cause of the former, and where it is the sole producing cause there can be no recovery; but when it is associated with actual injury it may be considered, and where the injury and the fright concur and result in producing shock, out of which arises damage, it is sufficient upon which to base a recovery.” Jones v. Brooklyn Heights R. R., supra at 143, 48 N. Y. Supp. at 915. Medical testimony in the case was that the miscarriage was caused by shock produced by the injury, and the court felt that the jury could have found for the plaintiff on the theory that the bulb at least struck plaintiff’s temple, producing the shock and consequent miscarriage.

Wood v. N. Y. Central & H. R. R. R., 83 App. Div. 604, 82 N. Y. Supp. 160 (4th Dep’t 1903), aff’d mem., 179 N. Y. 557, 71 N. E. 1142 (1904), reached a similar conclusion. There plaintiff was driving in a buggy across defendant’s railroad tracks at a crossing where the view was obstructed. An engine appearing suddenly, plaintiff jerked his horse back, but the horse started across the tracks, throwing plaintiff against the seat of the buggy. Immediately after the horse stopped the plaintiff spat blood freely, his condition grew steadily worse, and at the time of the trial he was suffering from tuberculosis. Physicians agreed that plaintiff’s condition was not the result of fright but of the physical strain. Again the court had occasion to distinguish the Mitchell case, saying: “That case is not akin to the present one. . . . The shock due to the severe physical exertion with the attendant rapid jolting ride over the defendant’s tracks and the sudden impact with the buggy seat, is wholly disconnected from fright, and affords adequate cause for the injuries.” Wood v. N. Y. Central & H. R. R. R., supra at 607, 82 N. Y. Supp. at 162. The court did not decide the specific question of proximate causation between the injury and the disease, but simply assumed that the jury on the new trial could reasonably find such connection.

Along similar lines was Buckbee v. Third Avenue R. R., 64 App. Div. 360, 72 N. Y. Supp. 217 (2d Dep’t 1901). Plaintiff was a passenger on defendant’s street car. She became alarmed at the sight of flames shooting from the controller box and left the car. In stepping on or over the metal door sill at the rear of the car she received an electric shock. Plaintiff testified that immediate severe pain resulted from the shock, and a physician who examined her two hours later stated that an electric shock received under such circumstances was adequate to cause the injuries which resulted. Distressing symptoms appeared immediately after the occurrence. The Mitchell case was distinguished on the ground that “. . . the shock occasioned by contact with an electric current must be regarded as a direct physical and personal assault for which a negligent defendant may be held liable.” Buckbee v. Third Avenue R. R., supra at 364, 72 N. Y. Supp. at 220.

To the same effect was Powell v. Hudson Valley R. R., 88 App. Div. 133, 84 N. Y. Supp. 337 (3d Dep’t 1903), wherein plaintiff was injured by fire communicated to her feet and dress while riding on defendant’s street car. The fire was caused by friction resulting from a contact between a wheel of the car and an iron plate over the same, drawn together by the overcrowded condition of the car. Shortly thereafter plaintiff suffered from nervous prostration. The burns were very slight; but the court held that, “While, from the cross-examination of Dr. Sanford, some expressions, read by themselves, might seem to indicate that the burns themselves had no connection with the present nervous condition of the plaintiff, the inference is irresistible from the evidence taken as a whole that the nervous condition of the plaintiff was in part due to the shock caused by the burns themselves.” Powell v. Hudson Valley R. R., supra at 137, 84 N. Y. Supp. at 340. The court distinguished the Mitchell case, saying in reference to it that “Our courts have never held, how-
"all-out" on that limb and have sometimes refused to allow recovery even where impact can be found.¹⁶⁹ Thus, a woman

ever, that where there is a physical injury for which a party is legally responsible that party is not responsible for any damages which follow from the shock or fright incident thereto." Id. at 137, 84 N. Y. Supp. at 340. See also Lofink v. Interborough, etc., 102 App. Div. 275, 92 N. Y. Supp. 386 (2d Dep't 1905). There plaintiff, a child of four years, in consequence of a collision between two railroad trains operated by defendant, was thrown from her seat forward against the glass at the side of the car and then to the floor between the seats. She was picked up, crying and screaming, by a fellow passenger. The court felt that the rule of the Mitchell case was not applicable because "The medical evidence, and the testimony in reference to the child's exclamations indicative of bodily pain, fully justify the inference that an abnormal nervous condition, partly manifested by 'night terrors,' was produced in the plaintiff by the physical shock which she suffered in consequence of the collision, and the right to recover for such injuries inflicted by the negligence of the defendant cannot seriously be questioned. Fright may properly be considered as an element of damage when it is associated with actual bodily injury." Lofink v. Interborough, etc., supra at 276, 92 N. Y. Supp. at 386.

¹⁶⁹ Newton v. New York, N. H. & H. R. R., 106 App. Div. 415, 94 N. Y. Supp. 825 (1st Dep't 1905), is a good example of denial of recovery even where there was a slight impact. It appeared that a train operated by the defendant railroad company collided with a train of another railroad company, upon which latter train plaintiff was a passenger. At the time of the collision plaintiff was sitting in the smoking car playing cards with three companions upon a board which plaintiff held in his lap. Plaintiff testified: "It was quite a heavy crash, a very heavy crash. It just threw me over in the seat. I did not think much of it at the time. The board was in our laps and it did not upset or anything in that way, but just a heavy crash and threw me forward. . . . I felt no pain or anything that day. I did nothing that day at all. I was kind of nervous and stayed around the office for a while and then went out and went home. . . . I began to feel shaky that day right after I got to the office, and my comrades in the office advised me to go home. I was glad to get home. When I got there I felt nervous and shaky. . . . I kept getting worse and worse." Newton v. New York, N. H. & H. R. R., supra at 418, 94 N. Y. Supp. at 826. Plaintiff called two physicians, one of whom had examined him about four months after the accident, and the other of whom had examined him just before the trial. These physicians testified that plaintiff was suffering from dilatation of the heart and from a valvular disease thereof. They further expressed the opinion that the condition could have been produced by a nervous shock but they did not testify that such nervous shock did in fact result from the crash or that it resulted from any physical injury which was the result of the collision.

The court, citing the Mitchell case, found that "... in the absence of evidence to show that there was caused by the accident a physical injury to the plaintiff's testator [the original plaintiff died pending the appeal], there was no cause of action." Newton v. New York, N. H. & H. R. R., supra at 420, 94 N. Y. Supp. at 827. The court held that the evidence did not sustain a finding that any physical injury had been done to the plaintiff, and it regarded the evidence of the physicians to the effect that plaintiff's condition could have been produced by a nervous shock experienced by him in consequence of what happened at the time of the collision as purely speculative. A dissent by Laughlin, J., argued: "The case of Mitchell v. Rochester Ry. (151 N. Y. 107), upon which the appellant relies, should, I think, be confined strictly to cases of injuries from fright without any direct physical injury or shock caused by the negligence of the parties sued," and pointed out that here the plaintiff
was denied damages where it appeared that defendant had taken her by the arm as she was about to board a street car and urged her to have sexual intercourse with him.\textsuperscript{170} It is difficult to see why the court did not employ the offensive touching as a springboard from which to jump over to the allowance of recovery.\textsuperscript{171} The decision was apparently put on the basis that the male does not reasonably expect from experience that non-violent proposals of sexual intercourse will produce nervous shock to the average female.\textsuperscript{172}

Several earlier lower court decisions have taken a very strict notion as to the causal relation required between the slight impact and the shock or fright, though this strictness has been since repudiated.\textsuperscript{173} \textit{Jones v. Brooklyn Heights}

\textquotedblleft... received as a direct consequence of the negligent collision which caused a 'very heavy crash' a physical jar which threw him over in the seat and at the same time he sustained a nervous shock as the direct result of the physical jar. ...\textquotedblright; \textit{Id.} at 428, 94 N. Y. Supp. at 833. This case seems clearly aberrational and under the more modern holdings such as Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931), plaintiff would almost certainly recover in a fact situation of this sort.

\textsuperscript{170} Prince v. Ridge, 32 Misc. 666, 66 N. Y. Supp. 454 (Sup. Ct. 1900).

\textsuperscript{171} In affirming dismissal of the complaint, the court indicated that "Mere words cannot amount to an assault... This [the complaint as drawn] seems to fairly exclude any idea of physical injury or damages for a battery... This so-called complaint bears no resemblance to a complaint for a wrongful battery," \textit{Id.} at 667, 668, 66 N. Y. Supp. at 455. Query whether the court is intimating that had the complaint been more artfully drawn in the form of a complaint for a battery, it would have been sufficient?

\textsuperscript{172} In accord with the New York view that no action will lie for inviting a woman to illicit intercourse is Davis v. Richardson, 76 Ark. 348, 89 S. W. 318 (1905).

\textsuperscript{173} In the same pattern is Shepard v. Lamphier, 84 Misc. 498, 146 N. Y. Supp. 745 (1914), wherein defendant by letter invited plaintiff, a married woman, to meet for immoral purposes. The letter was not libelous since the words amounted only to a proposal and since plaintiff herself had caused their publication, and the court went on to hold that no action of any kind could lie. "It is well established in this state that an action to recover for the utterance of defamatory words, not actionable in themselves, cannot be sustained by proof of mental distress and physical pain suffered by the complainant as a result thereof." Shepard v. Lamphier, \textit{supra} at 504, 505, 146 N. Y. Supp. at 749. Accord: Garrison v. Sun Publishing Co., 207 N. Y. 1, 100 N. E. 430 (1912).

\textsuperscript{373} \textit{See}, e.g., Newton v. New York, N. H. & H. R. R., 106 App. Div. 415, 94 (N. Y. Supp. 825 (1st Dep't 1905). A federal case involving much the same problem was Lehigh & H. R. R. v. Marchant, 84 Fed. 870 (C. C. A. 2d 1898). There a passenger was thrown from his berth in a sleeping car by a collision between trains, sustaining a slight physical injury. Afterwards serious nervous injuries developed which plaintiff claimed practically ruined his active life. There was evidence that plaintiff suffered a severe fright, and a medical expert testified that his present condition might have resulted from the fright. The court, citing the \textit{Mitchell} case, and also Ewing v. Pittsburg, etc., R. R.,
R. R.\textsuperscript{174} intimated that where the fright was the sole producing cause of the consequences for which recovery was sought, there could not be damages for such consequences even though there was an immediate physical injury occasioned by the wrongful act, unless the injury and the fright actually did concur in causing shock out of which damage arose.\textsuperscript{175} A later case\textsuperscript{176} held the same way. There it appeared that plaintiff and her two children were passing in a city street where defendant was laying mains. A pot for melting lead exploded and cast a few drops of lead upon plaintiff's hand and clothes. The burn was very slight,\textsuperscript{177} and on the first trial of the action a judgment in plaintiff's favor was reversed in the appellate division on the ground that the injuries were not due to the physical injury but to the fright which was not compensable.\textsuperscript{178} On a re-trial plaintiff obtained a new "expert" who testified that the slight physical injury might have caused the shock which resulted in the long train of disorders,\textsuperscript{179} and this time the appellate division sustained on the ground that "...there was some causal

\textsuperscript{174} 23 App. Div. 141, 48 N. Y. Supp. 914 (2d Dep't 1897).
\textsuperscript{175} The case itself, however, sustained a recovery. See note 168 supra.
\textsuperscript{177} Plaintiff's physician had prescribed a little ointment for the burn on her hand, but it was so slight as not to call for any further treatment, and at the time of the trial it was with difficulty that a faint scar was found. Plaintiff did, however, suffer nervous troubles and general debility of body, including disarrangement of her generative organs, manifested in a miscarriage 3½ weeks after the accident, a second miscarriage 6 months later after a two months' pregnancy, and a third miscarriage 3 months thereafter when in the third month of pregnancy.
\textsuperscript{178} Hack v. Dady, supra note 176 at 254, 118 N. Y. Supp. at 907: "If they [plaintiff's ailments] are at all consequent to the accident, I would rather ascribe them to the fright therefrom. The explosion, her proximity to it with two small children, may well account for her consequent fright, shock and nervousness. But as she cannot recover damages for her fright, she cannot recover for any physical consequences of her fright."
\textsuperscript{179} The gist of the expert testimony was that "If a woman pregnant were struck by a pea, for instance, a pea or a bean, any small object where there would be no violent attack, the sudden nervous shock to her system might cause it." Hack v. Dady, 142 App. Div. 510, 511, 127 N. Y. Supp. 22 (2d Dep't 1911). The expert's testimony is highly improbable. See Hertig & Sheldon, Minimum Criteria Required to Prove Prima Facie Case of Traumatic Abortion or Miscarriage, 117 ANN. SURG. 596 (1943).
relation between the bodily injury and the fright or shock.” 180 Still another case evincing a tendency on the part of the court to require actual causation contained facts indicating that plaintiff had been seated in her husband’s auto when the defendant’s truck backed into the auto. The court found no evidence of real physical injury to which the plaintiff’s later sufferings could be traced, and a judgment found by the jury for plaintiff was reversed. 181

The later interpretations of the impact exception have been considerably more liberal in allowing recovery. In Tracy v. Hotel Wellington Corporation 182 plaintiff was about to leave an elevator at the suggestion of the operator who preceded her when the elevator began to ascend without control. When the car was about four feet above the landing the operator seized the plaintiff and pulled her to the landing, the fall resulting in very slight bruises to her knees, shoulder and neck. The judgment for plaintiff was upheld on the ground that it was a jury question whether the neurotic condition and impaired physical health were caused by a nervous shock coming from fright only, or by a physical injury and fright concurring. 183

383 Tracy v. Hotel Wellington Corp., supra note 182 at 101: “The rule of law is that while there may be no recovery for mere fright, or for injuries that are the direct consequences of it, there may be a recovery, where bodily injury and fright concur in producing shock, giving rise to damage. . . . In the case of Mitchell v. Rochester Ry. Co. . . . it would seem that if the plaintiff had been knocked down by, or come in physical contact with, the horses, so as to have sustained some immediate personal injury, a recovery would have been sustained. The cases in which no recovery is allowed are cases where there is no concurrent bodily injury.”

The injury here was a neurotic condition and impaired physical health, diagnosed by plaintiff’s physician as post-traumatic neurosis. Lehman, J., dissented from the allowance of recovery on the ground that it was not shown that the nervous shock from which the neurosis developed was caused by the impact, saying: “It seems to me that the decisions in this state clearly establish that the plaintiff is not entitled to recover for the physical results caused by the fright or nervous shock of the accident, even though she may have suffered some scratches and bruises in addition to the physical shock; but she is entitled to recover for the damages caused by the nervous shock, if that nervous shock was the direct result of the physical impact.” Tracy v. Hotel Wellington Corp., supra note 182 at 105.
The latest Court of Appeals holding on the question, which was also an example of the immediate injury exception, is clearly in line with the modern tendency to regard the most trivial impact as a sufficient basis for the imposition of liability, even though the court did not base its entire ruling on that theory. The farthest extreme to which this impact exception has been pushed occurred in an unreported New York case which held that the impact required could be received through any one of the five senses.

E. The Workmen's Compensation Cases

In Workmen's Compensation claims the requirement of impact has been done away with completely since compensation rules do not require "natural and probable consequences" but only actual injury traceable to an accident in the course of employment. Furthermore, the claims come

185 For fuller discussion of this case see note 153 supra and accompanying text.
186 Gregory v. Wallabout Service Laundry, Inc., 77 N. Y. L. J. 607 (City Ct. May 5, 1927). Defendant, pursuant to a contract for the doing of laundry, delivered a package of laundered wash in which plaintiff found a dead mouse. Plaintiff alleged that she was rendered ill and unable to follow her usual vocation, wherefore she demanded damages of $3,000. The court said that "... the most recent cases holding that recovery may be had where any physical contact has been established have proceeded upon the theory that such physical contact may be asserted through any of the five senses, whether touch, feeling, taste, smell or sight." The court cited for the sense of smell, Carroll v. N. Y. Pie Baking Co., 215 App. Div. 240, 213 N. Y. Supp. 553 (2d Dept '1926); for sight, Sider v. Reid Ice Cream Co., 125 Misc. 835, 211 N. Y. Supp. 582 (Sup. Ct. 1925); for hearing, Matter of Thompson v. Binghamton, 218 App. Div. 451, 218 N. Y. Supp. 355 (3d Dept '1926).
187 In O'Connell v. Adirondack Electric Power Corp., 193 App. Div. 582, 185 N. Y. Supp. 455 (3d Dept '1920), the chief operator of the electrical system of an electric power company died from acute dilation of the heart, precipitated by worry, nervousness or excitement while directing restoration of the current interrupted by a storm which had damaged the wires. The court held there was no accidental injury because no accident of any sort had occurred to the decedent. However, the later case of Thompson v. City of Binghamton, 218 App. Div. 451, 218 N. Y. Supp. 355 (3d Dept '1926), effectively overruled the O'Connell case. There the death of a school janitor was occasioned through acute dilation of the heart caused by the exertion and excitement of answering a false fire alarm at the schoolhouse. The court did not specifically overrule the O'Connell case, saying: "Whether or not there is in principle a substantial distinction between that case and the present case, we think, under the authority of later cases, both in this court and in the Court of Appeals, there was in the present case an accidental injury sustained by deceased." Thompson v. City of Binghamton, supra at 357, 218 N. Y. Supp. at 453.
before experts familiar with the problem, and the supposed danger of falsification is not as great as when an untrained lay jury is utilized.\textsuperscript{188}

F. The Food Cases

Another exception to the non-liability rule has been developed in a series of food cases. In one of the earliest the plaintiff guest claimed violent illness from being exposed to a kidney saute indelicately seasoned with a field mouse which had been neatly cut into two portions.\textsuperscript{189} Apparently plaintiff's illness was caused not by the food, but by sight of the mouse, but the court seemingly decided the case on the idea of breach of warranty of fitness for human consumption.\textsuperscript{190} The Mitchell case is nowhere cited in the opinion, which may have been merely an oversight by the court but may also have been a method used to avoid the difficult job of distinguishing it away.

The general pattern of the food cases is very much the same, though the stimulus may vary, with cockroaches and mice definitely in the lead. A typical case involved cockroaches in a charlotte russe.\textsuperscript{191} In that case the appellate

---

\textsuperscript{188} See Bohlen & Polikoff, Liability in Pennsylvania for Physical Effects of Fright, 80 U. of Pa. L. Rev. 627, 637 (1932).

\textsuperscript{189} Barrington v. Hotel Astor, 184 App. Div. 317, 171 N. Y. Supp. 840 (1st Dep't 1918). Understandably enough the plaintiff claimed as part of his damages a "pronounced loss of appetite" for some weeks.

\textsuperscript{190} "A guest at a hotel, who orders a portion of kidney saute, has the right to expect, and the hotel keeper impliedly warrants, that such dish will contain no ingredients beyond those ordinarily placed therein. The hotel keeper also impliedly warrants that the dish is wholesome and fit for human consumption, and contains nothing rendering it unsuitable for use as human food. The defendant does not seek to justify the inclusion of the mouse in this dish as any proper part of its menu." Barrington v. Hotel Astor, \textit{supra} at 322, 171 N. Y. Supp. at 843.

\textsuperscript{191} Sider v. Reid Ice Cream Co., 125 Misc. 835, 211 N. Y. Supp. 582 (Sup. Ct. 1925).
term reversed a judgment for defendant and per curiam vigorously attacked the Mitchell decision, stating "there seems to be no reason for the rule announced in the Mitchell case. It is said that the rule was adopted as one of public policy, or as one of necessity to avoid the perpetration of fraud. Whatever may have been the prevailing conditions when this rule was announced, there is now no need of it on the score of public policy or necessity. . . . We think this whole subject should receive the further consideration of the appellate courts."  

Despite the vigorous wording of the opinion, the case was not appealed, and the appellate courts had no occasion to give "further consideration."

Another cockroach case (this time in pie) likewise rejected the Mitchell case but by way of distinguishing it rather than denouncing it. The court said that here, unlike the Mitchell case, the plaintiff's illness was not the result of fright, but resulted from the repulsive and nauseating character of the food sold by the defendant. In fact that amounts to distinguishing between forms of emotional disturbance which, while it may reach a just result, hardly seems a tenable ground logically. It would seem better to rationalize the food cases on the theory that they are analogous to the immediate physical injury cases in which recovery is allowed. In the one case there is an immediate physical reaction—nausea resulting in injury, and in the other there is an immediate physical reaction—fainting or weakness resulting in injury. It would seem that if recovery is permitted in one, it should be in both.

---

192 Id. at 836, 211 N. Y. Supp. at 583.
194 "The plaintiff in this case makes no claim that she was frightened. There is nothing about a cockroach, or several cockroaches, that would cause fright, especially when dead and crushed to such an extent that they resemble butterflies. The plaintiff's illness was not the result of fright, but resulted from the repulsive and nauseating character of the food sold by the defendant." Id. at 241, 213 N. Y. Supp. at 554.
195 For the immediate physical injury exeption, see text, page 44 supra.
196 The most recent food case appears to be Copeland v. Woolworth Co., 187 Misc. 456, 62 N. Y. S. 2d 660 (App. Term 1946). There plaintiff claimed that as she ate two spoonfuls of mince pie she noticed the pie did not look or taste good and had a bad odor, and suddenly she came upon a one and one-quarter inch wire nail imbedded in the mince meat. The repulsive condition nauseated her and made her ill. The appellate term in a per curiam opinion
G. The Wilful or Wanton Injury Cases

It is a general principle of tort law to extend and interpret more loosely rules of scope of liability when the tort involved is one of wanton or wilful harm, and this tendency is noticeable in the field of psychic stimuli. It was early held that a recovery for mental injuries and suffering alone is not precluded in wilful torts even where there is no showing of impact. Most of the early cases were in the appellate division, but the Court of Appeals soon had its say on the matter in a case arising in 1912. There it was indicated that if the conduct of the actor is wilful and wanton he in effect assumes the risk of his subject’s special vulnerability. The case involved a psychic stimulus other than fear, namely shame and mental anguish with consequent

reversed a plaintiff’s judgment for $50 and dismissed the complaint. Carroll v. New York Pie Baking Co., notes 193, 194 supra, was distinguished because “... the inference that a nail in pie is a repulsive condition similar to crushed cockroaches, is unwarranted. The metal nail can not be regarded in the same category as dead cockroaches which are subject to putrefaction.” Copeland v. Woolworth Co., supra at 457, 62 N. Y. S. 2d at 661.

Commenting on the attitude of the courts in wilful psychic injury cases, the former chairman of the Insurance Law Section of the American Bar Association points out that “... the courts seem to be extremely willing to grant a recovery of damages in favor of the plaintiff where there exists an element of wilfulness in the conduct of a defendant. ... About all that can be said is that the courts seem to be willing to punish a man for that which he does deliberately, whereas the tendency in many jurisdictions is to excuse that which flows from an unintentional act which does not bring about physical contact.” Jones, Fright, 289 Ins. L. J. 99, 107 (1947).


Hiscock, J., commented that “... in an action brought for the redress of a wrong intentionally, willfully and maliciously committed, the wrongdoer will be held responsible for the injuries which he has directly caused even though they lie beyond the limit of natural and apprehended results as established in cases where the injury was unintentional.” Id. at 8, 100 N. E. at 431.
sickness from a libelous charge, and it was held that the mental anguish and resultant physical ills could be compensated. It appeared that because of the wilfulness the court substituted the test of actual or direct causation for that of foreseeability.201

In that case the Court of Appeals was following a theory well enunciated in a previous lower court decision.202 There the decedent, suffering from heart disease and five months pregnant, notified defendant, her landlord, that she would be unable because of poor health to move promptly upon expiration of the lease. Nonetheless one day after the lease expired defendant began to tear down the house according to plan. The noise and excitement caused nervous shock which required decedent to go to a hospital where she died. It was held that decedent's legal representative could recover since the New York rule of impact applies only to injurious fright negligently caused, and not to wanton and wilful injuries.203

In a later case it appeared that defendant fired his gun several times through a window of plaintiff's apartment unaware that plaintiff was lying in bed in critical condition after childbirth of a few minutes before.204 The shooting caused nervous shock and hysteria for which defendant, because of his wanton wrong, was liable even though he did...

201 An interesting discussion of the general nature of “wilfulness” is found in a recent Iowa case, Blakely v. Shortal's Estate, 236 Iowa 787, 20 N. W. 2d 28 (1945) (decedent committed suicide in plaintiff's kitchen and sight of his body frightened her).


203 Id. at 573, 62 N. Y. Supp. at 892. The Mitchell case, supra note 164, “... applies only to actions based on negligence and not to cases of willful tort. ... In this case, however, the act of the defendants was in itself wrongful. It was a wilful and violent trespass upon the plaintiff's house for which an action will lie. ...”

To the same effect was Williams v. Underhill, 63 App. Div. 223, 71 N. Y. Supp. 291 (1st Dep't 1901). There plaintiff was employed as a nurse to defendant's children. Defendant assaulted and laid violent hands upon the plaintiff, and by reason of said assault the plaintiff was made sick and suffered great mental anguish, becoming nervously prostrated and insane. Again the court pointed out that “... the authority cited [i.e., the Mitchell case] applies only to actions based on negligence, and not to cases of wilful tort.” Williams v. Underhill, supra at 226, 71 N. Y. Supp. at 293.

not know of plaintiff's idiosyncrasy and even though there was no impact or technical assault.\textsuperscript{205}

It might be questioned whether in legal theory there is any justification for allowing recovery in psychic injury cases of wilful tort and not in negligent ones.\textsuperscript{206} It has been said that the denial of recovery has a sound basis in negligence actions, but that this should not be allowed to constitute a shield for the wilful wrongdoer. The feeling evidently is that the wilful wrongdoer should, where practicable, have his liability extended rather than restricted. The notion apparently still persists that tort law has in some contexts a punitive as well as compensatory purpose, and that intentional wrongdoers should be held strictly accountable. Thus, in view of the recognized tendency to interpret loosely rules of liability where wilfulness is involved, this exception seems to fit without difficulty into the general fabric of tort law.

H. \textit{The Right of Privacy Cases}

It was early held that compensatory damages for violation of the right of privacy established under the Civil Rights Law\textsuperscript{207} in New York include and are limited to the humilia-

\textsuperscript{205} In distinguishing the \textit{Mitchell} case, the court indicated that "Here, however, there is a great deal more. The defendant's act of shooting this gun through the lighted windows of plaintiff's apartment was so wanton, reckless and mischievous as to constitute an apparent disregard of human life." \textit{id.} at 548, 549, 221 N. Y. Supp. at 738.

\textsuperscript{206} The most recent New York case shows no indication of back-tracking on the consistent allowance of recovery in wilful injury cases. Bergman v. Rubenfeld, 66 N. Y. S. 2d 895 (City Ct. 1946), involved a counterclaim which alleged that plaintiff and another defendant acted in concert to obtain moneys from defendant, and that the actions in furtherance of the conspiracy were done for the purpose of forcing defendant to pay additional sums over and above an agreed commission. The court sustained the counterclaim, indicating that defendant could recover for mental suffering and damages flowing therefrom since the acts of the conspirators were wilful and malicious.

\textsuperscript{207} N. Y. CIV. RIGHTS \textsc{LAW} § 50. "Right of privacy.—A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

§ 51. "Action for injunction and for damages. Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have know-
tion, mortification, and mental distress which the plaintiff suffered. This right of privacy has sometimes been protected under the guise of the legal interest of the individual in his reputation, or under the guise of a defamation action where the rationale of defamation is used to redress an injury to personal privacy and dignity, as where a creditor uses a method of collection which is likely to affect adversely the debtor's community standing. In addition to damages for mental suffering in such cases, it has been suggested that injunction may be the appropriate method for preventing the continuance of such dunning letters.

But mental suffering is not always recoverable in these privacy cases especially if the plaintiff happens to be in public life. Recovery has been denied where the picture of a professional entertainer appeared without permission in one issue of a weekly paper, where a woman lawyer was portrayed in a newsreel because of her work in solving a murder.

Some of the more prominent articles on the right of privacy generally include Larremore, The Law of Privacy, 12 Col. L. Rev. 693 (1912); Green, The Right of Privacy, 27 Ill. L. Rev. 237 (1932). The ancestor of all these writings is, of course, the famous and oft-cited Warren & Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890).


Keating v. Conviser, 127 Misc. 531, 217 N. Y. Supp. 117 (1926) (letter to telephone operator's employer, stating that she was delinquent in paying for clothing bought on credit held not libelous per se but possibility of judicial protection in such situations implied).

Williams v. O'Shaughnessy, 172 N. Y. Supp. 574 (Sup. Ct. 1918). The case actually held that an injunction would not issue to restrain plaintiff's former attorney from writing letters to her, but the court indicated that, had the writing been done solely for the purpose of engendering annoyance, the writ would probably have issued.

Note that N. Y. Civ. Rights Law § 51 in note 207 supra does by its terms provide for injunction as a remedy in the situations covered by the statute.

See Sidis v. F-R Pub. Corp., 113 F. 2d 806 (C. C. A. 2d 1940) (the court felt that since Sidis, as a youthful genius, had become a matter of public interest, his future career was also a matter of public concern).

mystery,\textsuperscript{214} and where a newspaper published the picture and life story of a noted pugilist.\textsuperscript{215} Peculiarly enough, however, where a plaintiff appeared briefly and casually among other unnamed persons in the street scene of a film, recovery was permitted, probably because of the humiliating nature of the picture.\textsuperscript{216}

Closely akin, though distinct from the right of privacy cases, was the theory of recovery in the now outlawed alienation of affections action in which the loss of affections was the main damage and which was not maintainable if the defense showed that in fact the alienated spouse had not affection for plaintiff.\textsuperscript{217}

\section*{VII. New York Cases Since the Mitchell Decision Denying Liability}

Having looked at the exceptions to the general rule of non-liability, it is worthwhile briefly to examine the principal cases which have followed the \textit{Mitchell} rule and refused to impose liability.

First of all, liability has been denied in the situation where there is little or no physical touching and where the reaction is idiosyncratic and not within the scope of any of the exceptions hereinbefore enumerated. An injury seems to be considered idiosyncratic when the psychic stimulus is patently inadequate to arouse excessive physiological manifestations in an average person. In such an instance, especially where the symptom-free time extends for a considerable period after the accident, the courts have refused to impose liability mainly on the ground that the risk was unforeseeable, and this even in the face of a showing of actual causation.\textsuperscript{218}

\begin{itemize}
  \item \textsuperscript{214} Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N. Y. Supp. 752 (1st Dep't 1919).
  \item \textsuperscript{216} Blumenthal v. Picture Classics, 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dep't 1932).
  \item \textsuperscript{217} Servis v. Servis, 172 N. Y. 438, 65 N. E. 270 (1902).
  \item \textsuperscript{218} See Newton v. New York, N. H. & H. R. R., 106 App. Div. 415, 94 N. Y. Supp. 825 (1st Dep't 1905). There defendant's train collided with a train of another railroad company upon which latter train plaintiff was a
There is another series of cases which denies recovery where the stimulus is not directed at plaintiff but at someone else. Thus a plaintiff in an action for an assault committed on him in the presence of his wife could not recover for injuries to the wife occasioned by fright resulting in loss of her services to him. Nor could damages be had for personal injuries resulting from distress of mind at seeing plaintiff's cat mangled by defendant's trespassing dog, the plaintiff herself being perfectly secure and seeing the incident only from the window. Recovery was also denied where the stimulus was a fear of drowning felt by plaintiff's wife when defendant negligently caused plaintiff's cellar to be flooded.

passenger. The impact of the collision threw plaintiff forward in his seat, but did not otherwise injure him. A nervous condition, accompanied by dilation of the heart and a valvular disease thereof, was the claimed injury. The court held that the evidence did not sustain a finding that any physical injury had been done to the plaintiff, and denied recovery. Under the more modern slight impact cases, such as Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931), a different result might well be reached today. See note 169 supra for a fuller discussion of the Newton case.

Hutchinson v. Stern, 115 App. Div. 791, 101 N. Y. Supp. 145 (4th Dep't 1906). The stimulus caused plaintiff's pregnant wife to give birth to a premature and stillborn child. It would seem that a more forward looking court could have imposed liability under the wilful injury exception.

For a collection of cases from all jurisdictions dealing with the problem of mental distress caused by an act intended to affect a third person and the collateral question of "transferred intent" see PROSSER, TORTS §§ 9, 11 (1941).

Buchanan v. Stout, 123 App. Div. 648, 649, 108 N. Y. Supp. 38 (2d Dep't 1908). "The action then is in effect an action for negligence or nuisance; and it seems plain that the rule stated in Mitchell v. Rochester Railway Co. (151 N. Y. 107) is applicable . . . ." While recognizing that the Mitchell rule had no application to a case of wilful wrong or wantonness, the court found neither element present. Hence, plaintiff's only recovery was for the pecuniary value of the cat.

Cook v. Village of Mohawk, 207 N. Y. 311, 100 N. E. 815 (1913). The defendant municipality wrongfully obstructed a natural waterway in such manner as to discharge its waters upon plaintiff's lands. One of the items of plaintiff's damages was the loss of his wife's services owing to her inability to do her usual work on account of illness caused by the flooding of plaintiff's premises. The wife was fearful that the water, which had flooded the cellar, would continue to rise, and she became hysterical and nervous. Her ailment was a "flowing" or hemorrhage due to a small fibroid tumor, and the nervousness which was caused by the tumor was aggravated by the flooding, the result of all this being an increase in the gravity of the hemorrhage condition. The court reasoned as follows: "The defendant should not be held liable for the mental or nervous disturbance of plaintiff's wife due to a cause entirely separate from the flooding of plaintiff's premises. The wife had a fibroid tumor. If this was responsible for a mental or nervous condition which made her unnecessarily apprehensive of the flooding of the land, and this increased the ailment, the defendant cannot be charged with the consequences. Mental suffering is not a legal element in such cases . . . and there can be no recovery except for physical ills which can be ascribed directly and with reasonable
It is to be noted that the cases which deny recovery do not fall precisely within any of the exceptions already examined, and in them the courts are usually very careful to point out that there can be no recovery for mental suffering in the absence of some corporeal or personal injury or breach of duty. But where such a breach of duty can be found, recovery will be permitted as in a recent case where plaintiff obtained recovery for a nervous condition caused by defendant's blasting.

VIII. THE REAL PROBLEM—THE QUESTION OF EVIDENCE

Having analyzed, as typical of the New York view, the Mitchell case, and the multitude of decisions which have followed it, and having found their arguments for denying re-
covery lacking in soundness, attention may now be focused on what is believed to be the real issue in the psychic injury cases—the problem of evidence. Since it has been demonstrated that in legal theory there is no impediment to liability in such cases, the important question is how far the zone of such liability shall radiate. The ensuing discussion seeks not to lay down any flat rule in that regard, since it must needs be that courts feel their way constantly as medico-legal thought advances, but an effort is made to point up the types of problems which will be paramount in the ultimate demarcation of the liability zone.

A. The Psychoneuroses

The main difficulty in the psychic injury cases is concerned with the mental condition of the plaintiff. If the plaintiff be the victim of a pre-existing mental disorder, then it is quite possible that his response to the psychic stimulus was abnormal or idiosyncratic in the sense that “the reasonable, prudent man” would not have so reacted. This pre-existing abnormality will usually be of the type designated “psychoneurotic” and will fall, for purposes of classification, within one of the four ordinarily recognized categories of the psychoneuroses.224

1. Hysteria. Hysteria is a neurotic condition characterized by symptoms referable to the sensory-motor nervous system.225 Motor weakness—paralysis of some sort—may be present, or changes in ability to use the senses may occur. Illustrations of hysterical conditions would be aphasia,226 im-

---

224 The categorizations and discussions of the psychoneuroses herein contained are based in the main on the analysis of Dr. Smith and Dr. Solomon in Traumatic Neuroses in Court, 30 Va. L. Rev. 87 (1943).

225 For an early illustration of the use of the psychoanalytic technique in the treatment of hysteria, see the well known work of Katz, op. cit. supra note 224.

226 Aphasia is inability to talk or impairment of speech facilities in some way. See Kupke v. St. Louis Transit Co., 122 Mo. App. 355, 99 S. W. 472 (1907).
pairment of vision,\textsuperscript{227} deafness,\textsuperscript{228} amnesia\textsuperscript{229} and various paralytic manifestations.\textsuperscript{230}

2. Neurasthenia. Neurasthenia is a neurotic condition characterized by a sense of weakness and exhaustion,\textsuperscript{231} or various pains of the body,\textsuperscript{232} all of which exist without apparent physiological explanation. Difficulty in concentration,\textsuperscript{233} lack of interest in life,\textsuperscript{234} and worry over sanity\textsuperscript{235} may also be symptomatic of neurasthenia.

3. Anxiety States. The neurotic suffering attacks of acute anxiety experiences the physical accompaniments of anxiety feelings in the normal individual, such as rapid pulse,\textsuperscript{236} increased heart beat,\textsuperscript{237} tremors,\textsuperscript{238} and often there is the fear that physical and psychological collapse is impending.\textsuperscript{239}

4. Obsessive Compulsive Syndrome.\textsuperscript{240} This neurotic condition is manifested by fears or feelings on the part of the patient that he is likely to be compelled to do something which in his normal state he does not wish to do.\textsuperscript{241} He may feel that he will throw himself in front of a train, or he may develop a phobia of being in open spaces\textsuperscript{242} or of being in an enclosed place.\textsuperscript{243}

\textsuperscript{227} Texas Utilities Co. v. Dear, 64 S. W. 2d 807 (Tex. Civ. App. 1933).
\textsuperscript{229} Morris v. Union Depot Bridge & T. R. Co., 320 Mo. 371, 8 S. W. 2d 11 (1928).
\textsuperscript{230} Louisville Southern R. R. v. Minogue, 90 Ky. 369, 14 S. W. 357 (1890).
\textsuperscript{231} Parr v. Detroit, 272 Mich. 659, 262 N. W. 443 (1935).
\textsuperscript{232} Mullery v. Missouri & K. Telephone Co., 191 Mo. App. 118, 177 S. W. 1098 (1915).
\textsuperscript{233} Tate v. Western Union Telegraph Co., 339 Mo. 262, 96 S. W. 2d 364 (1936).
\textsuperscript{234} Garthley v. Seattle Electric Co., 49 Wash. 616, 96 Pac. 155 (1908).
\textsuperscript{236}St. Louis & S. F. R. R. v. McFall, 63 Okla. 124, 163 Pac. 269 (1917).
\textsuperscript{238} Summerskill v. Vermont Power & Mfg. Co., 91 Vt. 251, 99 Atl. 1017 (1917); McQuary v. Penketh, 194 Wash. 57, 76 Pac. 2d 1024 (1938).
\textsuperscript{239} Klein v. Medical Bldg. Realty Co., 147 So. 122 (La. App. 1933).
\textsuperscript{240} “Syndrome” refers to a group or set of symptoms which occur together.
\textsuperscript{241} Bartlett v. Pontiac Realty Co., 224 Mo. App. 1234, 31 S. W. 2d 279 (1930).
\textsuperscript{242} Agoraphobia is a morbid dread of crossing, or being in the midst of, open spaces.
\textsuperscript{243} Fear of enclosed places is claustrophobia. The recognized types of fears
B. Liability Problems Presented by the Psychoneurotic Plaintiff

The usual rule in tort, where an impact upon the person of plaintiff has occurred, is that the tortfeasor takes his victim as he finds him, and is liable even for unforeseeable consequences. Thus when the impact aggravates some physical condition of the plaintiff, such as a hidden disease or pregnancy, the defendant is held responsible even though such consequences could not have been reasonably anticipated.

Objection has been made to this rule on the ground that it imposes liability which may be far greater than the slight dereliction of the defendant seems to warrant. A defendant guilty of a minor indiscretion may find his whole private fortune destroyed because he has been unlucky enough to strike an unusually vulnerable plaintiff. In effect his liability is extended far beyond the scope of the risk which he has created. The justification for such extension is stated to be that, as between the tortfeasor who started the chain of circumstances resulting in the injury and the entirely innocent plaintiff, the tortfeasor should suffer the consequences.

are legion and include among others anglophobia (dread of England or the English), bacteriophobia (morbid fear of bacteria), dermatophobia (morbid dread of having some skin disease), doraphobia (morbid dread of touching the fur or skin of animals), dysmorphobia (morbid dread of deformity), lyso- phobia (morbid fear of rabies), neophobia (morbid dread of new things), pharmacophobia (morbid dread of medicines), photophobia (abnormal intolerance of light), pyrophobia (morbid dread of fire), sitophobia (morbid dread of taking food), sphyliophobia (morbid fear of syphilis), thanatophobia (unfounded apprehension of imminent death), toxicophobia (morbid dread of poisons), zoophobia (insane dread of animals) and—perhaps the oddest of all—phobophobia, or fear of one's own fears.

244 Ross v. Great Northern R. R., 101 Minn. 122, 111 N. W. 951 (1907); McCahill v. New York Transp. Co., 201 N. Y. 221, 94 N. E. 616 (1911) (unusual in that the latent disease was alcoholism). Other cases have reached the same result in regard to paralysis, Bishop v. St. Paul City Ry., 48 Minn. 26, 50 N. W. 927 (1892); pneumonia, Beauchamp v. Saginaw Mining Co., 50 Mich. 163, 15 N. W. 65 (1893); endocarditis, Keegan v. Minneapolis St. Ry., 140 Minn. 248, 167 N. W. 1041 (1918).


246 This is pointed out by the court in Ryan v. New York Cent. R. R., 35 N. Y. 210 (1866).


Similar difficulties arise in the psychic injury cases, and here they are, if possible, even more difficult of solution. Suppose the plaintiff's neurotic background is aggravated by the stimulus produced by defendant so as to create in plaintiff a severe neurosis, and the stimulus was such as to affect a normal person little if at all. Shall the defendant be liable to compensate plaintiff for all the effects both physical and mental flowing from the neurotic condition, or only for some fractional part thereof?

The problem is pithily posed in Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. Rev. 87, 99 (1943): "Assume for the moment that study of the claimant's pre-traumatic personality shows a neurotic constitution or condition sufficient to make the subject an extreme reactor to stimuli which would only mildly affect the average person, if at all. In his case a $5.00 touch may become a $10,000 disability. Shall the law protect this fragile fellow to the full, or where shall legal and social policy draw the lines limiting the compensation he may obtain?"

Smith & Solomon's solution to the problem is well stated in their metaphor of the cracked vase at page 110: "Still again, we may compare the pre-traumatic condition of such a neurotic to a cracked vase. The unobservant or untrained eye may not notice the crack, but only that the vase will hold water. It is only when the crack spreads and the vase will no longer hold water that he is conscious of any defect. But the law of torts must follow the rule of the market place and take cognizance that a cracked vase is not so valuable as an intact one. If the defendant's conduct causes the crack to spread, he may justly insist that he shall not make compensation on any assumption that the vase was previously perfect. So here, traumatic neurosis resulting from trivial stimuli should be treated as mere accession to, or aggravation of, a pre-existing impairment. Once this truth is grasped we can expect to see the measure of damages lowered to more modest levels."

The same authors give a good illustration of the possibility of a slight stimulus bringing into full flower a latent neurotic condition. They recite the oft-seen wartime case of the soldier with neurotic tendencies. He is faced by an unresolved conflict between self-preservation and doing his job faithfully. Suddenly he is subjected at the front to a minor concussion or a purely psychic disturbance. This accident leads to removal to a medical station and affords an opportunity for the development of symptoms which result in removal from the front and care in the hospital. Thus his symptoms solve his problem, even though he is not a conscious malingerer. Smith & Solomon, *op. cit. supra* at 98.

A very brief and undocumented article on this question is Stotter, *Extent of Liability for Injuries to Neurotic Person Yet to Be Decided*, 16 CALIF. ST. Bar J. 44 (1941). The article makes no attempt to offer any solution, but it is a good illustration of the legal practitioner's recognition of the factors involved. Mr. Stotter comments: "Now, we are advised on fairly good authority that your chances of colliding with and injuring a neurotic person if you have an unfortunate automobile accident is about one out of four or five [the authority for the statement is not given]. Such a person develops all manner of aches, pains and disabilities without much relation to actual tissue and organ injury.

"What is going to be the attitude of the law as to these honestly felt pains and really incapacitated persons? The law says you can recover for mental pain, shock, excitement, etc., if you can show some physical (tissue) injury, provided it is proximately the result of the negligent act.
Thus, where the injury complained of is the result of psychic stimuli, the problem inevitably arises of making an analysis of the reaction of the injured plaintiff. Some individuals can better stand stresses and vicissitudes than others. Whereas one woman may faint and suffer injury upon seeing her children riding in an elevator unaccompanied by an attendant, another more phlegmatic may not. While all our tort law abounds in the concept of "the reasonable man," the difficulties inherent in determining whether the reaction of any one particular man to a situation is "reasonable" or "unreasonable" may become extremely complex. Such questions enter as what was the man's personality and constitutional make-up before the injury, and what part of the total injury really represents a pre-existing weakened or neurotic constitution merely aggravated by stimuli which would cause no such symptoms in a normally constituted person. If we follow the Freudian view that the cause of neurosis lies in emotional and mental conflicts which have not been resolved but instead pushed into the so-called "sub-conscious" of the individual, it is easy to realize that much of the distress resulting from sudden psychic stimuli may be merely a reflection of the pre-existing conflicts suddenly breaking out into the open.

"Whether such mental pain and incapacity to function is the proximate result of a specific act on the part of someone else is quite hard to answer. There is always back of these cases a pre-disposition, a pre-existing cause. In the words of the psychiatrist such would be termed only a precipitating cause, real causes going back often to childhood experiences.

"The legal definition of proximate cause helps us but little, and would no doubt be broad enough to cover what is meant in psychiatry by a precipitating cause. If a delicate and frail person physically is struck by an automobile, he is injured more than a robust person. The proximate cause of his injuries is not the fact that his mother did not give him enough spinach when he was a child. So we may collide with a neurotic and he may without the least malingering have back-ache, dizziness, insomnia, stomach trouble, head-ache, coma, crossed eyes, loss of hearing, ringing in the ears, loss of appetite, and anesthesias galore. Can he not recover for these as being proximately caused if a jury is of the opinion that he would have not had same but for the accident and if he is not malingering?" Stotter, op. cit. supra at 45.


252 A good resume of Freudian theory is found in a collection of his leading articles by Katz, Freud: On War, Sex and Neurosis (1947).
C. Problems of Expert Testimony

The essential reason why expert testimony is admissible in any case is, of course, necessity. The proper administration of justice in tort cases, as in other fields of the law, requires that lay jurors shall receive the aid of qualified specialists in fields where the knowledge of the jurors is too limited to enable them to reach sound conclusions. The questions that arise in considering the admission of expert testimony are then:

(1) Is the subject matter of the case one of peculiar complexity?

(2) Is competent expert opinion available?

It is believed that the conclusion is irresistible that the essential problem in the psychic injury cases is that of evidence. If the extent of the injury and the fact of causation can be reliably established by competent evidence, recovery should be allowed. If these factors cannot be reliably proved, recovery should not be permitted. The nucleus of the question is then the reliability of the expert testimony in this field inasmuch as the only even apparently valid method of establishing the extent of injury and the fact of causation is by expert testimony.

Based upon the analyses which have been made in this article it is submitted that certain propositions in regard to expert neuropsychiatric testimony are well established. It appears clear, for instance, that a high proportion of the psychic disturbance cases involve plaintiffs who are victims of pre-existing personality disorders. Pre-existing mental disorders of mild and moderate nature are triggered by the psychic trauma or physical trauma occurring at the time of the accident and become so aggravated as to be easily observable. As a corollary to this proposition, it can be stated that so-called "normal" individuals will not suffer psychic reactions from psychic or physical trauma unless such trauma be of long duration or great intensity. However, in the borderline cases no clear rule can be formulated to determine whether the reaction suffered by the plaintiff is a "normal" one or an idiosyncratic one, and in the present
state of psychiatric knowledge there inevitably must exist this "shadow-land" area in which the experts themselves will disagree. Since everything depends upon the pre-existing personality make-up of the plaintiff, the force of the stimulus (i.e., the extent of the "cerebral insult"), and the susceptibility of the plaintiff to the stimulus, a great possibility of disagreement among experts exists in the borderline situations. It is here that the popular concept of psychiatry as an exact science must fall before the onslaught of pure fact; for psychiatry, at best, is a combination of science and art.

This is not to say that the use of expert testimony is not at all feasible in psychic injury cases. On the contrary, such testimony is extremely worthwhile in distinguishing the obviously neurotic reactions of plaintiffs from "normal" reactions, and, even in the close cases, opinion evidence furnishes a working context in which the triers of fact may operate. With a complete case history and study of the patient, the psychiatrist can resolve the "easy" case, and shed some light in the "hard" cases. As would naturally be expected, the degree of insight which the psychiatrist can give to the triers of fact is in direct proportion to the completeness and thoroughness of his analysis of the plaintiff-patient.

As to the danger of fraud in the psychic injury cases, it would be naive to think that such danger does not exist. Grave possibilities of fraud do exist because of the inherently subjective nature of mental reactions. Certain it is that some plaintiffs, spurred by the hope of compensation, and, unhappily, often aided by unscrupulous or overzealous attorneys, deliberately falsify and exaggerate symptoms. It is probably true that the hope of compensation also acts to induce unconscious malingering in some situations through the development of the so-called "compensation neurosis." The best preventative of the danger of fraud lies in thorough examination and interrogation of the plaintiff-patient by expert witnesses and in a knowledge of psychiatric phenomena by attorneys engaged in this type of litigation.

On the question of the utilization of objective criteria for determining the nature and extent of psychic injuries it can be said that such criteria simply do not exist. With the possible exception of a few standardized psychometric tests
of intelligence and broad personality categories and the electroencephalograph, useful in epilepsy cases, there are no reliable objective guides. Everything in the last analysis rests upon the skill of the expert in examining the patient and the technique of the attorney in questioning the expert in court.

An important phase of the expert testimony question is that of cost. Many attorneys labor under the misapprehension that examination and testimony by a competent neuropsychiatrist is extremely expensive. Actually in the ordinary case it is not. The fee for neurological examination in the typical psychic injury case ranges from twenty-five to fifty dollars, while the fee for one day's testimony in court approximates one hundred dollars. These figures are misleading in one sense, however. While such figures do cover the types of examinations utilized in the ordinary case, they by no means take into account the long-range studies which may be required in difficult cases. A twenty-five or fifty dollar examination is a cursory one, lasting one or two hours, and consisting only of psychiatric interrogation of the patient coupled with utilization of a few standard tests. While this is sufficient in many cases, others may require much more protracted examinations and analyses with consequent manifold multiplication of costs. It is undoubtedly true also that many cases which at present are handled through the cursory examination procedure might well receive longer and more thorough studies if the additional cost factor were not present.

A final difficulty with psychiatric testimony is that, like most expert testimony, it is adversary in character. The plaintiff hires his psychiatrist who has, of course, been selected because his report is favorable to the plaintiff, and the defendant employs a psychiatrist favorable to his side in an effort to rebut the testimony of the plaintiff's expert. This is not to impugn the character of the expert witnesses or to imply that their opinions are swayed by the payment of a fee. In the great majority of cases the experts are entirely honest, and their disagreement is simply a typical illustration of reasonable minds differing in their opinions. Then too, there is the further difficulty that at present the personality of the expert is so important a factor in deciding cases.
The jury all too often is impressed by the erudite-appearing expert who states his conclusions in a dogmatic manner, and may well decide the case in favor of the party for whom such an expert testifies while in reality the less sure-spoken expert of the other side may have the better of the argument from the strictly scientific point of view. It is common knowledge that some psychiatric experts have an excellent "courtroom presence" and a flair for the dramatic which is likely unduly to impress the lay jury.

A possible answer to the problem of adversary witnesses suggests itself, although it is beyond the scope of this article to discuss in detail such a solution. The suggestion is that some form of non-adversary procedure be provided such as a board of experts paid by the state to testify in these cases. Objections exist to such a plan, but since the state clearly has an interest in the proper administration of justice it is perhaps not too much to ask that effort be made to protect that interest through provision of state-paid experts.

D. Recommended Rule

It is submitted that the better rule in psychic injury cases is to allow compensation only for that part of the in-

---

253 See, for fuller discussion of such a proposal, note 268 infra. An interesting further problem in the medical testimony field is the evidence question of the admissibility of hospital records, particularly where they involve psychoneurotic diagnosis. The federal rule apparently sharply limits the introduction of such evidence under the federal entries in the regular course of business statute, 49 Stat. 1561 (1936), 28 U. S. C. A. 695 (1946). See, e.g., New York Life Ins. Co. v. Taylor, 147 F. 2d 297, 303 (1945), where the court commented: "Hospital records are no different from any other kind of records kept in the regular course of business. They must be subjected to the same tests as to subject matter. Regularly recorded facts as to the patient's condition or treatment on which the observations of competent physicians would not differ are of the same character as records of sales or payrolls. Thus, a routine examination of a patient on admission to a hospital stating that he had no external injuries is admissible. An observation that there was a deviation of the nasal septum is admissible. Likewise, an observation that the patient was well under the influence of alcohol. But the records before us here are not of that character. The diagnosis of a psychoneurotic state involves conjecture and opinion. It must, therefore, be subjected to the safeguard of cross-examination of the physician who makes it. And accounts of selected items with patients must be subject to the same safeguard."

The New York rule, however, is otherwise. See, e.g., People v. Kohlmeyer, 284 N. Y. 366, 31 N. E. 2d 490 (1940), which recognizes no distinction between the admissibility of evidence of physical or mental condition under the New York entries in the regular course of business statute, N. Y. Civ. Frac. Act § 374-a.
jury actually caused by defendant's wrongful act. If the stimulus has been a minimal one, expert testimony should be introduced in order to show what the average reaction would be to such a stimulus, and if the plaintiff's reaction has not been that of the average individual, he should not recover at all, or at least his damages should be reduced to a small amount. In addition to limiting the area of liability to the extent of the risk normally to be perceived by the reasonable defendant, such a rule could have the further effect of inducing greater psychic strength in people by removing the temptation to develop neurotic complications in the hope of monetary reimbursement.

In summing up the problem of evidence which the courts must face, it should be recognized, first of all, that the

---

254 It would appear that our present psychiatric knowledge is adequate in most cases to make such determinations as to the normal or idiosyncratic reaction to psychic stimuli. Smith & Solomon find that "... a competent psychiatrist can usually expose evidence of definite personality neurosis antedating the allegedly causal episode, and make a fair apportionment of symptoms, partly to pre-existing impairment and partly to the aggravation caused by the accident." Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. Rev. 87, 108 (1943).

Medical testimony is not without difficulties, however, in the psychic injury field. Whereas the medical practitioner likes to know the etiology (the cause), the pathology (the nature), the symptoms, and the course of a disorder, these are never available in complete form when dealing with the psychoneurotic conditions. Furthermore, because no structural pathology of either the visceral or nervous systems has been discovered to explain psychoneurotic deviations, it is not possible to check a diagnosis through studies of pathology. For a general discussion of this problem, see Tibbits, *Neurasthenia, the Result of Nervous Shock, as a Ground for Damages*, 59 Cent. Law J. 83 (1904).

255 There seems little doubt that psychic injury cases are now being too liberally compensated. An analysis of all psychic stimuli cases in the British and American appellate courts showed that cases of traumatic neurosis following trivial impact or psychic stimulus had received average jury verdicts of $8,300 despite the fact that such reactions were clearly idiosyncratic, whereas the verdicts in cases of non-idiosyncratic traumatic neurosis incident to serious physical injuries were only slightly greater in amount, averaging $9,600. Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. Rev. 87, 113 (1943).

256 It is at best conjectural to speculate on the effects of the hope of monetary reimbursement in these cases, inasmuch as no reliable statistics are available on the particular question. It may be argued that a high proportion of these cases is brought against corporate defendants and from that the conclusion may be adduced that the hope of compensation is an important factor. However, the force of this argument is greatly weakened by lack of statistics as to the wealth or lack of wealth of these corporate defendants, the extent of insurance coverage, and so on. It may well be that the hope of compensation, if it is in fact an important inducing cause to the development of neurosis, operates on the level of the subconscious rather than in the form of deliberate malingering.
psychic stimuli such as fright do not usually produce either physical injury or neurotic complications in a person of average constitution. Such developments are very likely to be evidence of a pre-existing disorder and sub-normal psychic resistance. Even the miscarriage, which so often appears in the psychic disturbance cases, may well be an idiosyncratic reaction which should not charge the defendant with liability unless he somehow had notice of the plaintiff’s condition. The rule of law should therefore be that a defendant is not negligent unless it appears that he created an unreasonable risk of causing psychic disturbance in a person

257 Persuasive evidence of this contention is the fact that combatant soldiers and sailors, exposed to fright and other psychic stimuli of far greater intensity than those normally experienced in psychic injury tort cases rarely develop either physical or mental complications. See Gowan, *Psychiatric Aspects of Military Disabilities*, 41 U. S. NAV. MED. BULL. 129 (1943): “Experiences so far in the war indicate that from one-half to two-thirds of those who suffer nervous break-downs are predisposed to such disabilities.” Comm. Gowan goes on further to state: “War experiences often act as a precipitant for emotional disturbances that under ordinary circumstances are held in suspension. War neurosis is not a new disease, but merely the appearance of previously existing neurotic tendencies brought to the front and organized into form by exposure to war’s demands. From one-half to two-thirds of those suffering mental or nervous disturbances among our armed forces show definite predisposition.” *Id.* at 137.

258 A study made of the combat neurosis in the recent war shows that even psychic injury from harrowing experience is likely to result only where pre-existing neurotic impairment was present. In a study of individuals who had survived ship sinkings during the war, it was found that seven out of ten of the individuals who suffered combat neuroses had had neurotic symptoms prior to entering naval service, while of those who did not develop neurotic complications only one out of ten had had neurotic symptoms in civil life. As might be expected eighty per cent of the neuroses were of the anxiety type. Schwab, Feinesinger and Brazier, *Psychoneuroses Precipitated by Combat*, 42 U. S. NAV. MED. BULL. 535, 544 (1944).

The detection of the psychoneurotic individual before he enters military service is, of course, the aim of psychiatrists in the armed forces. How widespread is the existence of disqualifying neurosis is shown by a study of selective service data during the recent war. A sampling study of registrants in the 21-36 year old group reached the conclusion that over six per cent of those medically disqualified for service were disqualified for mental and nervous defects. Rowntree, McGill & Folk, *Health of Selective Service Registrants*, 118 J. A. M. A. 1223 (1942). Similar conclusions were advanced from a study of the younger registrants. Rowntree, McGill & Edwards, *Causes of Rejection and the Incidence of Defects (Among 18 and 19 Year Old Selective Service Registrants)*, 123 J. A. M. A. 181 (1943).

259 An analysis of one thousand cases of spontaneous abortion indicated that only one could definitely be attributed to trauma or psychic disturbance, though many of the patients believed that the cause was such disturbance. See Hertig & Sheldon, *Minimum Criteria Required to Prove Prima Facie Case of Traumatic Abortion or Miscarriage*, 117 ANN. SURG. 596, 598 (1943): “... it is the consensus of medical opinion that at least ten per cent of all pregnancies

of average normal health. The criteria for determining such risk should be both judicial notice of scientific fact and expert medical testimony.

IX. CONCLUSIONS

Many of the courts which passed on this question in the nineteenth century reached the same conclusion as the New York Court of Appeals and denied liability. However, the English courts, where the doctrine was born, have since re-

ternate in spontaneous abortion, and that only rarely are such abortions caused by trauma." On the question of time interval between shock and abortion, the same authors indicate that "... minutes to hours is the time interval between the occurrence of the external trauma and/or psychic shock which initiates the sequence of events resulting in the expulsion of a normal ovum." Id. at 606. As a matter of ultimate conclusion the authors felt that "It is the consensus of opinion of at least the average conscientious expert medical witness involved, that, all too often, justice is not served and that the plaintiff is awarded damages for an abortion or miscarriage in which the trauma was, at most, only coincidentally concerned." Id. at 596. See also Rock, Abortion, in 1 Davis, Gynecology and Obstetrics, ch. 10 (1941); Gelber, Medico-Legal Text on Traumatic Injuries 70 (1938).

Such a rule would leave room for the introduction of new medical discoveries into the law, and for the redefining of "unreasonable risk" as medical knowledge progresses. For example, it now appears that in a large category of the fright cases—the miscarriage cases—there is medical evidence to indicate that frightening a pregnant female does not create "unreasonable risk" of bodily harm in the form of a miscarriage. Except in those situations where violence has been inflicted on the fetus itself, factors other than the psychic stimulus must be viewed as the predisposing causes. Such factors might be defects in the fetus, or in the mother. For a full collection of authorities on this question, see Note, Tort Liability for Miscarriage Caused by Fright, 15 U. of Chi. L. Rev. 188 (1947). The writer of the note, on the basis of a review of leading medical authorities, concludes that fright is not a cause of abortion, and that there is no known process or route by which a mental state may transmit a force causing injury to a fetus. The writer indicates that, despite the great mental tension in unmarried mothers, the incidence of abortion in that group is no greater than among married mothers. Furthermore, it is pointed out that experiments conducted on pregnant animals, such as cats and monkeys, in an effort to produce abortion by shocks, have all failed. In conclusion it is stated: "In the face of the overwhelming weight of leading medical opinion, plaintiffs should be required to produce more than circumstantial evidence in order to sustain the burden of proving that the miscarriage resulted from fright. As the law is today, buses cannot jolt, trains cannot jerk, and men cannot shout or have automobile collisions in front of the predisposed, pregnant woman. It seems unreasonable to ask society to assume this degree of care. Interested as society must be in the unborn, liability would appear to place too great a burden upon the everyday activities of a turbulent civilization." Id. at 192.

As to the feasibility of expert testimony in psychic injury cases, see note 254 supra.

For a complete listing of the states denying liability and an enumeration of their leading cases, see note 40 supra.
pudiated the denial of recovery, and a majority of American jurisdictions now permit recovery. The American Law Institute, while reluctant to take an unequivocal position, in the Restatement of the Law of Torts has in general effect disapproved the New York rule, and no less an authority than Justice Holmes has termed it an "arbitrary exception" to settled principles. Legal scholars are unanimous in condemnation and no one seems inclined to defend the rule except the New York courts.

But as we have seen even in New York the principle of no liability has been riddled by exceptions. While the rule was designed to defeat fabricators, now with all the available exceptions, it is possible for any fabricator to succeed in his case by merely including the one necessary magic element to come within the bounds of an exception. The only one who is defeated is the honest litigant who will not falsify,

---

263 See text, page 3 supra, "DEVELOPMENT OF THE ENGLISH RULE."

264 The majority rule decisions are collected in note 43 supra. That the trend in American law is definitely towards the allowance of damages for mental distresses and injuries resulting therefrom is clear. An excellent recent law review note on the general field of damages includes the observation, substantiated by a thorough review of current authorities, that, "An ever-increasing tendency to award damages for mental distress is apparent from the course of judicial decisions." Note, Developments in the Law—Damages—1935-1947, 61 Harv. L. Rev. 113, 138 (1948).

265 RESTATEMENT, TORTS § 436 (1934) reads: "Physical Harm Resulting from Emotional Disturbance.

(1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

"Caveat to Subsection (2): The Institute expresses no opinion that the unreliability of the testimony necessary to establish the causal relation between the actor's negligence and the other's illness or bodily harm may not make it proper for the court of a particular jurisdiction to refuse, as a matter of administrative policy, to hold the actor liable for harm to another which was brought about in the manner stated in this Subsection."


267 See, e.g., Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193 (1944); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); Throckmorton, Damages for Fright, 34 Harv. L. Rev. 260 (1921); and other leading articles mentioned in note 38 supra.
and who, if he does not come squarely within an exception, will not obtain redress for an injury which everyone agrees was foreseeable and culpably caused by another. Certainly the present law is intolerable, and statutory or judicial elimination of the requirement of impact is the only remedy. Dangers of fabrication of evidence where they exist can be effectively combated by demanding clear and cogent evidence according to the best medical standards available.\footnote{268 See text, page 76 supra, "RECOMMENDED RULE" for discussion of evidentiary problems presented. As is there shown, modern medical and particularly psychiatric testimony can determine with reasonable certainty what reactions are normal and what idiosyncratic, and, on that basis, judgments can be awarded which fairly represent compensation for the injury culpably caused by a defendant. See on this point, note 254 supra and Smith & Solomon, Traumatic Neuroses in Court, 30 Va. L. Rev. 87 (1943), particularly at 107, 108, 112, 113, discussing the concepts of "normal" and "idiosyncratic" and other problems posed by pre-existing neurotic disorders. An incisive comment on the need for keeping our law in tune with medical advances in this field is that of Albert Jones: "There was a time in human history when persons afflicted with nervous disorders were supposed to be possessed of devils and were either put to death or confined in institutions. Medical science has progressed a long way since the Dark Ages and conditions that were once thought to be the product of the machinations of the devil are now known to be the result of bodily disorders. In the light of the earlier concept, the courts were fully justified in looking with suspicion upon the claims of individuals so afflicted. Advances in medical science have taught us the error of the earlier views. Unless the law is attuned to progress in medicine, psychiatry, psychology, and other sciences, it will be difficult to maintain the confidence of the average citizen in the courts." Jones, Fright, 289 Ins. L. J. 99, 101 (1947). Mr. Jones is a former chairman of the Insurance Law Section of the American Bar Association.}

Harold F. McNiece

St. John's University School of Law.

\footnote{268 See text, page 76 supra, "RECOMMENDED RULE" for discussion of evidentiary problems presented. As is there shown, modern medical and particularly psychiatric testimony can determine with reasonable certainty what reactions are normal and what idiosyncratic, and, on that basis, judgments can be awarded which fairly represent compensation for the injury culpably caused by a defendant. See on this point, note 254 supra and Smith & Solomon, Traumatic Neuroses in Court, 30 Va. L. Rev. 87 (1943), particularly at 107, 108, 112, 113, discussing the concepts of "normal" and "idiosyncratic" and other problems posed by pre-existing neurotic disorders. An incisive comment on the need for keeping our law in tune with medical advances in this field is that of Albert Jones: "There was a time in human history when persons afflicted with nervous disorders were supposed to be possessed of devils and were either put to death or confined in institutions. Medical science has progressed a long way since the Dark Ages and conditions that were once thought to be the product of the machinations of the devil are now known to be the result of bodily disorders. In the light of the earlier concept, the courts were fully justified in looking with suspicion upon the claims of individuals so afflicted. Advances in medical science have taught us the error of the earlier views. Unless the law is attuned to progress in medicine, psychiatry, psychology, and other sciences, it will be difficult to maintain the confidence of the average citizen in the courts." Jones, Fright, 289 Ins. L. J. 99, 101 (1947). Mr. Jones is a former chairman of the Insurance Law Section of the American Bar Association.}