Traumatic Neurosis

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COMMENTS

TRAUMATIC NEUROSIS

I. INTRODUCTION

Every personal injury affects in some measure both the mind and the body. The legal compensability of the mental aspect of such injury was, for centuries, so limited as to be practically nonexistent. An emerging body of modern medical and scientific theory respecting the nature and degree of mental harm has been reflected in recent tendencies to re-examine the traditional legal attitude.¹

Insofar as mental injury disables the victim of tort to an extent no greater than a coinciding physical injury, no substantial problem of compensation is likely to arise. The legal approach to such cases is simply to merge the mental injury, most commonly under the label of pain and suffering, in the physical, permitting the latter to control the value of the case. Mental injury may, however, be substantially more disabling, or it may persist far longer than the physical injury. Or, there may be evidence of mental harm where no physical injury in fact resulted from the tort. In these instances, the mental harm may be considered to be excessive, or unrelated to the physical injury. Whenever disproportionate mental harm is encountered as one of the consequences of a tortious act, traumatic neurosis may constitute an element of the injury.

It is the purpose of this article to indicate the present state of medical and scientific progress in the field of traumatic neurosis. It will be the further purpose to summarize the present legal status of mental harm as a basis of civil liability in general and to consider the rationale underlying liability and compensation for mental harm, particularly with respect to traumatic neurosis.

II. MEDICAL BACKGROUND²

A. In General:

The term, physical aspect of the personality, has reference to the tangible body tissues, such as the blood, bones, nerves, muscles and their functions. The mental aspect, or the mind, encompasses the conscious and unconscious functioning of the nervous system. The conscious processes of the mind are concerned with such functions of the brain as thinking, association, memory and speech. The unconscious processes include the emotions such as love, hate, rage and fear.³


² The following texts have been used as authority for the medical background of traumatic neurosis: Strecker, Practical Clinical Psychiatry (7th ed. 1951) and Noyes, Modern Clinical Psychiatry (4th ed. 1953).

³ For a more detailed description of the anatomy of the nervous system with
The term, pathology, denotes any abnormality of structure or function of body or mind. A pathological condition may result from disease or injury. In some instances, the cause may not be susceptible of objective observation, in others it may be unknown.

One must beware, however, of thinking of the physical and mental aspects of the personality in terms of a dichotomy of body (soma) and mind (psyche). The essential unity of the person, traditionally, has been accepted in the philosophical thought of medicine. Psychiatry has long maintained "... that man was a total and indivisible unity, and, therefore, in health and disease, every somatic process at once reverberated in all of the man and notably in his emotions; conversely, that every emotional reaction, whether it was violent and pathologic, like rage, or merely feeling tone, like a mild state of satisfaction, immediately had repercussions in every tissue and cell of the body."4

Recent studies of the physiological (functional) changes incident to psychological (mental) disturbances have re-emphasized this unity. These studies, known as "psycho-somatic" research, have demonstrated the interaction of mental and physical processes, and the interdependence of function and structure of the organism.5

B. The Neuroses:

The neuroses are pathological conditions primarily affecting the mind. They are generally considered to be relatively mild disorders of mental functions. A neurosis may be distinguished from other disorders affecting the mind, as for example a psychosis, in that the neurotic individual remains oriented as to his environment while the victim of a psychosis may lose touch with reality. The neurotic is concerned with himself and with his symptoms. Usually this disorder is only temporarily disabling. In its overt or acute phase it may, however, seriously interfere with daily life and occupation. A neurosis is not considered to be an intermediate or transitional stage leading to the outbreak of the generally more serious disorders such as psychopathic personality disorders or psychoses.

1. Medical Causation of the Neuroses:

The most recent official classification of mental disorders adopted by the American Psychiatric Association lists the neuroses or psychoneuroses (the latter term is preferred as emphasizing the mental character of the disturbance) as one of the "disorders of psychogenic origin or without clearly defined tangible cause or structural change in the

reference to psychosomatic disturbance see Wasmuth, Psychosomatic Disease and the Law, 7 CLEV.-MAR. L. REV. 34, 36 (1958).

4 Strecker, op. cit. supra note 2, at 430.

Psychogenic origin simply means that the cause lies in the mental life.

A complex mechanism is believed to be involved in this causation which requires a more detailed explanation in order that the relationship of the neuroses to trauma may be appreciated. One widely accepted view as to the operation of this mechanism is that originally formulated and described by Freud, and illustrated by his classic case reports. Freud believed that man's behavior is motivated by unconscious urges seeking gratification, as well as by conscious thoughts. The so-called normal or well-adjusted individual adapts to the experiences of life, to environmental exigencies, by a repression, a losing in the unconscious, of these instinctive urges which would result in socially unacceptable behavior. In the neurotic, the process of this adaptation is faulty. Although the neurotic achieves the same result as does the normal individual, the repression is not successful. This results in fear, either that the instinctive gratification may not be found, or that, in finding it, personal danger or discomfiture may result.

It must be understood that there is no conscious awareness of this fear, of the emotional conflict which produces it, or of the mechanism of the adaptation as a whole. This fear is expressed in what the psychologist calls the "affect" of anxiety. The term, "affect," may be defined as the degree and capacity of emotional reaction in response to stimulation. It is a characteristic of the particular makeup or constitution of each individual. In the well-adjusted person, the fear and anxiety, if occurring at all, are dissipated by constructive behavior, a process known as sublimation. In the neurotic, because of an inherent constitutional defect, by some thought to be hereditary, by others believed to be due primarily to experiences and resultant faulty attitudes occurring during the formative years of early childhood, the defective repression and resultant fear generate a continuing, pervasive anxiety. This anxiety is the dynamic source of the neuroses. It is unconsciously present; and the mind, as a compensating or defensive mechanism, again without conscious awareness, attempts to overcome the anxiety by behavior which, in turn, constitutes the characteristic symptomatology of the various neuroses. The neurotic does not voluntarily act in this manner, he does not understand why he acts thus, or that his behavior is the price exacted of him for conforming to environmental and social situations. If the experiences of his daily life make little demand on his emotional life, if he is not further confronted with stimuli of fear, or situations fraught with anxiety, the latent neurotic tendencies ordinarily will not interfere with his usual occupation or daily life.

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6 NOYES, op. cit. supra note 2, at 161, 163.
7 FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS (1934).
8 STRECKER, PRACTICAL CLINICAL PSYCHIATRY 14 (8th ed. 1957).
It must be remembered, however, that the constitution of the neurotic is vulnerable; that his sensitivity to the stimulus of fear may be far greater than that of the so-called normal individual; and that his response to such stimulation may be greatly exaggerated. An overt, disabling neurosis may be precipitated not only by one given, powerful impulse, but may follow relatively minor occurrences and situations. This response of the neurotic may be likened to the predisposition to break a bone, such as may occur in certain diseases. A slight impact, even a hardly noticed glance, may result in a fracture, even though in the absence of such predisposing disease, no injury would be sustained at all.

The neuroses may respond to treatment, usually some form of psychotherapy predicated on the theory as to their psychogenic origin. This attempts through analysis to unveil the original circumstances giving rise to the emotional conflict, to raise this conflict from the unconscious to the conscious level of the mind, and thereby to remove the cause of the fear and anxiety. Or, it is attempted to remove such cause by assisting the victim through guidance to resolve the basic problem so disclosed.\(^9\) Not every neurosis responds to therapy. Sometimes, the acute phase subsides without treatment. Neuroses frequently are not seen by the psychiatrist at all, but are discovered and treated by the general medical practitioner in the course of consultation for some physical ailment, especially for such complaints as headaches, sleeplessness, indigestion, backaches and tiredness. It has been estimated that as high as 40 to 50% of the complaints of patients encountered in general practice may be traced to a neurotic origin.\(^10\)

2. Classification of the Neuroses:

The neuroses commonly are grouped according to specific behavioral reaction patterns associated with various compensating devices or defense mechanisms. Currently, the following major reactions are classified: anxiety, dissociative, conversion, phobic, obsessive-compulsive, depression and unclassified groups.\(^11\) It is not intended here to give comprehensive, differential descriptions or detailed clinical histories of these entities, but rather to identify them briefly by their principle and distinguishing characteristics, particularly as they may relate to the subject of traumatic neuroses. It should be noted, that these classified reactions are not necessarily distinct, clinical entities; that there is a

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\(^9\) Dr. C. G. Baker, Superintendent and Chief Psychiatrist, Yankton State Hospital, S. Dak., in Traumatic Neuroses, 25 INS. COUNSEL J. 88 (1958), suggests as additional therapy in cases of traumatic neurosis the immediate settlement of litigation from the financial standpoint. He particularly cautions against financial pension arrangements since these will "... almost certainly propose a secondary gain for the indefinite continuation of the symptom." (For "secondary gain" see infra note 22.) See also Hood v. Texas Indemnity Insurance, 146 Tex. 522, 209 S.W.2d 345 (1948).

\(^10\) Strecker, op. cit. supra note 2, at 436.

\(^11\) Noyes, op. cit. supra note 2, at 163.
merging of symptoms and behavior; and that in some instances a differential diagnosis may not be possible.

a. Anxiety Reaction:

No specific compensation device is involved in the causation of the anxiety reaction. Evidence of anxiety is direct, known as "free-floating," and is shown by nervousness, timidity, general apprehensiveness, and sometimes depression. This is the chronic worrier, the unreasonably timid and frightened person. Accompanying symptoms of various physiological disturbances are frequently encountered, such as palpitations, raised blood pressure, indigestion and diarrhea. Although these functional disturbances are objectively determinable, there is no discoverable organic cause underlying their presence. This reaction is frequently encountered in traumatic neurosis. Its symptoms may be substantially like those constituting ordinary mental anguish. Anxiety neurosis is indicated when such symptoms are seemingly disproportionate to the injury sustained. It is probable that in many instances such a neurosis may go undetected because it is not distinguished from ordinary anguish.

b. Conversion Reaction:

The conversion reaction, or conversion hysteria as it is sometimes called, also frequently involved in traumatic neurosis, has long been recognized as an entity. The term, conversion, describes the psychological mechanism responsible for the production of the symptoms. It is believed that the repressed impulse is converted or changed directly into a functional disturbance. This disturbance usually is objective in nature, but is without observable pathologic cause. It is thought to represent the hidden, underlying emotional conflict in symbolic form. The disturbance here may be sensory, such as anesthesia (loss of feeling), paresthesia (prickling or tingling), blindness, or deafness; or it may be motor, such as paralysis, contractions, tremors or tics, aphonia (the inability to articulate speech), mutism (inability to phonate), or

12 A sampling of cases involving the anxiety reaction are the following: (severe agitative state) Potere v. City of Philadelphia, 380 Pa. 581, 112 A.2d 100, 104 (1955); Sexton v. Key System Transit Lines, 144 Cal. App.2d 719, 301 P.2d 612 (1956); (mixed anxiety and conversion reaction) Reyer v. Pearl River Tung Co., 219 Miss. 211, 68 So.2d 442 (1953).
13 Noyes, op. cit. supra note 2, at 13.
15 Chicago, Rock Island & Pacific Railway Co. v. Kifer, 216 F.2d 753 (10th Cir. 1954).
16 Ladner v. Higgins, 71 So.2d 242 (Court of Appeals La. 1954); (loss of vision and of hearing, numbness, heat flashes), Morris v. Garden City, 144 Kas. 790, 62 P.2d 920 (1936).
even writer's cramp. There may also occur disorders of memory and association such as amnesia (loss of memory), a usually of a temporary duration; or aphasia (the inability to speak or understand speech without loss of nervous control of the muscles involved). The personality in conversion neurosis appears markedly different from that encountered in the other neurotic reactions. There is no evidence of anxiety, and the individual takes a complacent, but not overly concerned interest in his symptoms; he may even be said to enjoy them on occasion. The predisposing constitution is frequently found to show emotional immaturity. Although these symptoms, such as paralysis or anesthesia, are clearly observable, it will often be noted that they vary from those which would have been produced by organic causes such as physical injury or disease. Thus, the anesthesia may be what is called a "boot" or "glove" anesthesia; that is, it affects what the victim believes to be a functional unit rather than an actual functional area of nerve patterns. Nerve reflexes may be intact. This is not to say that these disturbances are consciously faked or wishfully produced. On the contrary, their origin remains hidden from the victim as part of his unconscious mental processes.

Characteristic of the conversion reaction is the fact that it may have a self-serving aspect called "secondary gain." The observable symptoms of physical disability arising from the psychological disorder serve the purpose of meeting or fulfilling a need or desire, as for example a craving for attention and sympathy, or the wish to escape from a difficult or unpleasant situation, or the desire for indemnification or compensation for some injury sustained, which the neurotic individual would not admit as bearing any relationship to his disability. The connection between the neurotic symptoms and such desires may be obvious to others; it is not consciously realized by the victim. In fact, he would deny, emphatically and in good faith, that any such relationship might be possible.

c. Dissociative Reaction:

The dissociative reaction involves disturbances of consciousness, such as partial or total loss of memory, delirium or even stupor. In this reaction occur the "dissociative fugues." This term describes a condition in which the individual is unconsciously impelled to follow some undertaking, the significance of which remains hidden to him. It may involve acts of fantasy such as the assumption of a false name or identity. Here also is observed the "Ganser syndrome." This syn-

21 Chicago, Rock Island & Pacific Railway Co. v. Kifer, 216 F.2d 753 (10th Cir. 1954).
22 Noyes, op. cit. supra note 2, at 464.
23 Noyes, op. cit. supra note 2, at 456.
24 Noyes, op. cit. supra note 2, at 457, 505.
drome occurs in situations in which the individual is confronted with a relatively simple problem. In resolving the problem, the person approximates the answer, not correctly, but with a near miss. For example, he may state the number eleven as the sum of five and five. Seemingly this conveys an impression of irresponsibility. This reaction is also thought to have self-serving aspects. It is infrequently encountered in litigation.

d. Phobic Reaction:

The phobic reactions are characterized by intense, unreasonable fears arising from unrecognized sources, but focusing on immediate objects or situations. These are the well known phobias, too numerous to list, with new names being coined every year. A random sampling would include claustrophobia (the fear of confined places), agoraphobia (the fear of open places), aelurophobia (the fear of cats), and monophobia (the fear of being alone). The extreme distress provoked by these fears may be accompanied by physical symptoms such as rapid, pounding heart beats, nausea and extreme fatigue.25

e. Obsessive-Compulsive Reaction:

The typical behavior encountered in this reaction is characterized by a compulsive, "ritualistic" repetition of thoughts and acts. This activity is thought to be a substitution rather than a conversion of the defectively repressed motivating impulse. The individual may be unduly meticulous, insecure and particularly sensitive to emotional conflict. An often cited example of this reaction is found in the housewife, who compulsively empties ash trays after each speck of ash is deposited, or who cleans an already immaculate house. This reaction is sometimes referred to as psychasthenia.26

f. Neurasthenia:27

Another disorder reaction is that known as neurasthenia. This is sometimes classified as a "psychophysiological asthenic" reaction, (asthenic meaning debility or want or loss of strength), or it may be grouped with the neuroses, under the anxiety or conversion reactions if the symptomatology falls predominantly within these particular patterns. This disorder is characterized by chronic fatigue, occurring especially when constructive work is attempted, but usually not interfering with personal desires. There is an exaggerated preoccupation with physical organs and their functions, which is believed to be a trans-

25 Cf. RESTATEMENT, TORTS §905, comment i (1934): "Thus, unless a recognizable mental disease results, there can be no recovery for a long continued morbid propensity to fear death from rabies, where there is proof that the dog which bit the injured person was healthy, nor can there be recovery for the totally unfounded fear of a woman that an injury has prevented her from ever being able to have a child."

26 NOYES, op. cit. supra note 2, at 13.


28 NOYES, op. cit. supra note 2, at 435-437.
ference of the unconscious concern with emotional problems. The symptoms of neurasthenia are often observed in the conversion reaction.

g. Traumatic Neurosis:29

The term, traumatic neurosis, has a more practical application in law than in medicine. The term is not used to identify a particular behavioral reaction pattern. Rather, it is descriptive of the factors directly responsible for the appearance of the neurotic symptoms, even though their psychogenic origin lies in emotional conflicts remote from these immediate causal factors.

A given pathological condition is said to be traumatically caused when it arises in consequence of the impact of an external force upon the individual.30 Whenever the impact involves a tangible, physical force, the legal and lay comprehension of the nature of such a force and resultant injury is identical with the medical. Where, however, the impact affects primarily the mind (e.g. the threat of personal harm, or the mental stress accompanying actual physical impact), it may result in emotional stress because of the fear and anxiety generated. This stress may evoke a pathological condition affecting the mind. The existence of such mental injury, or psychic trauma, is accepted by medicine, and is finding acceptance by the general public and by the courts.31

The nature of psychic trauma is thus, in the last analysis, the response evoked by the impact on the mind resulting from externally originating impressions, transmitted to the mind by the sensory apparatus of the body. The immediate harmful effect of such mental impact has variously been called “nervous shock”32 or “emotional distress.”33 Since it is believed that body and mind constitute an “essential unity,” it follows that all injury to the person results in some harm to the mind (psychic trauma) even though this may be so fleeting or insignificant that it will not be noted. Psychic trauma, whether incident to physical impact or not, may have further pathological mental consequences beyond those of the immediate injury. When there appear

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29 Smith and Solomon, Traumatic Neuroses in Court, 30 VA. L. Rev. 87 (1943) presents a comprehensive study of the medical and legal aspects of this topic. See also Loria, Medicolegal Aspects of Traumatic Neurosis, 35 Mich. S.B.J. 38 (1956).

30 Lyng v. Roa, 72 So.2d 53 (Fla. 1954).


32 Orlo v. Connecticut Co., 128 Conn. 221, 21 A.2d 402 (1941); and see cases cited note 31 supra.

33 The RESTATEMENT, TORTS §46, comment f (1948 supp.) defines emotional distress as including “mental anguish, grief, horror, shame, humiliation, embarrassment, mortification, anger, chagrin, disappointment, worry and nausea.”
symptoms of any one of the reactional patterns of the various neuroses following such an impact, either independently, or as an overlay to any physical injury that may have been sustained, the neurosis may then properly be called a traumatic neurosis.

Medically, trauma is not considered the primary cause of such a neurosis. It is thought that the emotional strain and anxiety produced by the trauma, or the stress incident to physical injury, or the disruption involved in the circumstances under which the trauma was sustained, aggravate the pre-traumatic imbalance of the neurotic individual. The vulnerable personality is triggered, precipitating the overtly manifested, possibly disabling behavioral reaction. Thus, trauma, although not causing the neurosis, may nevertheless be an efficient cause of its disabling symptoms.

Several questions arise in the confirmation of a diagnosis of traumatic neurosis and in relating the neurosis to a given injury. First, does the pre-traumatic constitution disclose evidence of a neurosis? While such evidence is almost essential to establish a finding of traumatic neurosis, it will at the same time establish a pre-traumatic impairment. Second, what is the nature of the injury, and where is its site? Since such areas as the head, spine and heart are commonly held in special regard as vital to existence, injuries to those areas may arouse greater anxiety and a higher incidence of neuroses. Similarly, where the injury occurred under particularly gruesome or harrowing circumstances, or where there is a definite, prolonged period of apprehensiveness, the resultant emotional stress may be a strong indication of the presence of a neurosis. Third, what anxiety producing factors occurred in the bridging interval between injury and the onset of the neurotic symptoms? Here must be considered the train of events set in motion by the injury itself. Undue solicitude by the family or by medical attendants may arouse fears as to the severity of the injury. Concern about the financial burden resulting from the injury and possible incapacity may give rise to further anxiety. Thus, it may be observed that neurotic symptoms in response to these factors may appear as an overlay to the actual physical harm sustained, or in the absence of such harm, after the lapse of considerable time from the psychic impact. And, of course, these neurotic symptoms may well persist after objective findings of physical harm have disappeared.

h. Compensation Neurosis:

The term, compensation neurosis, like traumatic neurosis, does not

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34 Strecke, op. cit. supra note 2, at 409.
35 "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." Smith and Solomon, supra note 29, at 110.
describe a specific behavioral reaction, but is applied to any of the neuroses when the element of “secondary gain” is believed to be one of the dynamic sources in the production of the neurotic symptoms. These will often follow the pattern of the conversion reaction, and may also involve those of the anxiety, phobic and compulsive neuroses.

In compensation neuroses, the desire for and expectation of indemnification for a real or supposed disability underlies the element of secondary gain and constitutes an important motivating factor in the operation of the neurotic, psychological mechanism. Nevertheless, it is believed that this behavior is not consciously motivated, and it should again be noted that the relationship between desire and the production of disabling symptoms is not voluntary, nor is its significance realized by the individual who is the victim of this disorder. To establish the existence of a compensation neurosis, and thereby to substantiate the involuntariness of the behavior, it may be necessary to look to the past history of the individual’s personality, for the predisposing neurotic constitution characterized by nervousness, insecurity, sensitivity, aggressiveness, craving for attention or sympathy, sleeplessness, or such physical complaints as gastro-intestinal disturbances, headaches and other vague, unspecific complaints.

It has been observed that the disabling symptoms encountered subsequent to the injury and during the course of pending litigation which constitute the compensation neurosis do not necessarily disappear on the termination of the dispute, even though the outcome thereof is favorable to the claimant.\(^{36}\)

The phenomenon of compensation neurosis was recognized and studied in World Wars I and II, and is of significance today in workmen’s compensation cases as well as in personal injury claims. Elements of compensation neurosis, that is, symptoms traceable to secondary gain factors, may appear independently after an injury has been sustained. They may also be encountered where a traumatic neurosis has been diagnosed, in which instance these symptoms constitute an overlay to the already existing neurotic behavior. To establish such a differential diagnosis may pose extremely difficult problems to the clinician. The relationship of a compensation neurosis to the trauma would seem to be tenuous. The further the anxiety producing factors responsible for its appearance are removed in time and direct consequence from the injury, the more such factors partake of the nature of independent, intervening causes. Nevertheless, such neurotic symptoms have been considered part of the total neurotic reaction following trauma.\(^{37}\)

\(^{36}\) Smith and Solomon, \textit{supra} note 29, at 138.

\(^{37}\) “It would be hard to differentiate between a traumatic psychoneurosis and compensation neurosis in this case.” The court concludes that where there is conclusive evidence that the claimant was disabled, it is not necessary to
In considering the secondary gain aspects of the neuroses, a distinction between that phenomenon and malingering is pertinent. Because the relationship between the underlying, motivating desire and the means by which gratification may be sought (i.e. such disability as will call for compensation) seems so obvious, the conclusion is often drawn by the layman that the disabling symptoms are willfully produced and that the claim is fabricated. Again, it must be emphasized that the behavior of the neurotic is not willfully determined, and that its motivation is unconscious. The malingerer may be distinguished from the neurotic by the skilled observer. The conscious faker may also be recognized by the common sense of laymen. Malingering is sometimes considered to be a symptom of a mental disorder (constitutional psychopathy), also of psychogenic origin, but one that does not involve the mechanisms associated with the neuroses. In malingering, the fabrication of symptoms and of claims is produced with full consciousness of the simulation and with the realized desire thereby to achieve compensation.

3. Summary of Medical Background:

Medical science offers law in the concept of traumatic neurosis a term which indicates the circumstances giving rise to the overt manifestation of any one or more of the clinically distinguishable behavioral reaction patterns constituting the neuroses. Thus, the harm sustained by the victim of a traumatic neurosis falls within the category of an identifiable, medically recognized disorder of the mind. It further offers widely accepted theories as to the medical causation of the neuroses, their origin in the mental life of the victim. From these theories it follows that traumatic neurosis occurs because of the heightened susceptibility, characteristic of an already impaired constitution, and that the disabling symptoms of traumatic neurosis are therefore but an aggravation of a previously existing mental disorder.

Significant to legal considerations of the subject of traumatic neurosis is the estimated incidence of the neuroses in the general population. It would appear that traumatic neurosis is not an instance of esoteric, highly unusual mental harm, but that a substantial minority of people show evidence of having a constitution that is predisposed to sustaining a traumatic neurosis under given circumstances.

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III. MENTAL HARM AS A BASIS OF TORT LIABILITY

A. Present Status:

When dealing with traumatic neurosis as an element of damages, it must first be inquired whether mental harm in general may be compensable under the facts of the given case. The basic problems which accounted for the traditional reluctance to accord legal recognition to mental harm must be met by the courts today in a re-examination of the question of the compensability of injury to the mind. Essentially, this reluctance arises from the intangible and subjective nature of the harm. Because such harm is not susceptible of objective determination, doubt as to its reality and extent led, in the past, to the formulation of rules to the effect that mental harm, independently, could not support a cause of action. The rationale of these rules varied with the nature of the action in which compensation for mental harm was sought, as well as with the particular views of the various jurisdictions. Thus, it has been held that mental harm was speculative, that its compensation would lead to vexatious and fictitious claims, and that there was no reliable standard of measurement. In negligence actions it was decided that no duty could be owed to any person to refrain from inflicting mental harm upon him; that such harm could not reasonably be foreseen; that such harm was not proximately caused; that it was too remote; or simply, that such harm did not warrant legal redress as a matter of public policy.

Notwithstanding the traditional views, decisions today reveal a trend toward greater liberality in the compensation of mental harm. Earlier objections have been overcome in part by the recognition of scientific advances and by changing social and judicial attitudes. Nevertheless, the older problems, as well as new questions incident to the application of medical facts to legal doctrines have not been fully resolved. As yet there are no clearly defined rules of general applicability governing the status of mental harm as a basis of tort liability.

1. Intentional Tort:

In the action of assault, a mental state constitutes the gist of the damages. The impact of the tortious conduct is solely on the mind and the injury sustained consists of emotional distress. Here, the transient state of apprehension may be compensable, as are also such

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39 "To properly estimate such a cause of damages, the door must be opened to the realms of philosophy, physiology and psychology." Johnson v. Wells, Fargo & Co., 6 Nev. 224 (1870); Michelson v. Fischer, 81 Wash. 423, 142 Pac. 1160 (1914).
40 Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898).
43 RESTATEMENT, TORTS §21 (1934): "apprehension of an immediate and harmful or offensive contact."
damages, as the mental distress flowing from the injury.\textsuperscript{44} Assault is the only action in which the interest in freedom from mental disturbance was given early and unanimous recognition.\textsuperscript{45} The rationale is thought to rest on a vestige of the early criminal nature of the action, the punishment of criminal attempts carrying over in the punitive nature of the damages for this attempted battery, which constitute a breach of the peace.\textsuperscript{46} The great majority of the courts permit recovery even though no physical injury results.\textsuperscript{47}

It is also well established that mental disturbance may be an element of damages incident to the invasion of an independently recognized interest, as for example, in false imprisonment,\textsuperscript{48} seduction,\textsuperscript{49} alienation of affections,\textsuperscript{50} and assault and battery.\textsuperscript{51} Here, mental harm is in effect “parasitic” to the legally protected interest.\textsuperscript{52}

Precedent supports the imposition of liability for insulting, threatening or harassing language or conduct in the so-called carrier cases.\textsuperscript{53} At first, insults to passengers by the defendant’s employees were considered to be a tort arising out of a breach of the contract of safe carriage, or a breach of a special obligation to the public.\textsuperscript{54} Gradually, the action was held maintainable in other instances where a special relationship between the plaintiff and the defendant could give rise to a privity of contract or to special obligations between the parties, as between debtor and creditor,\textsuperscript{55} and tenant and landlord.\textsuperscript{56} However, a right to compensation could arise only where the tortious conduct, usually insult or threat (not necessarily to personal safety) resulted in tangible, physical harm.\textsuperscript{57} In the so-called dead body cases, liability is imposed for intentional conduct involving mutilation and mishandling of corpses,

where this causes mental distress.\textsuperscript{58} Public censure of such conduct may account for this particular rule. In connection with this general category of liability for insulting or threatening conduct, it should be noted that where the conduct is particularly reprehensible and the physical harm sustained is slight, there has been a tendency to find a technical tort to support the claim.\textsuperscript{59}

There is a "definite trend" today to consider the intentional causing of severe emotional distress as a separate tort.\textsuperscript{60} That is to say, security of the mind, independently of security of the physical body, is accorded legal protection. In view of the case law, this statement is too broad unless important qualifications are added. The language and conduct must consist of more than mere insult. It must in fact be reprehensible and outrageous. The emotional distress must be sufficiently severe to cause or be evidenced by physical symptoms.\textsuperscript{61} In the light of these qualifications, the "new tort"\textsuperscript{62} encompasses a logical extension of the principles of the carrier cases to situations where no special obligations and relationships exist. In effect, the actor may with impunity insult the so-called normal person. When, however, he affronts a pregnant woman, or a person suffering from heart disease or from conversion hysteria, the risk of possible physical consequences such as miscarriage, heart failure, or hysterical paralysis resulting from the emotional distress is shifted to the actor.

2. Negligence:

Traditional principles respecting the legal protection of the interest in freedom from mental disturbance against invasion by negligent conduct are also in a process of change. The trend is toward greater protection and a corresponding extension of liability. This trend, however, has stopped short of recognizing the negligent invasion of mental security, standing alone, as giving rise to a cause of action.\textsuperscript{63}


\textsuperscript{60} RESTATEMENT, TORTS \S 46 (1948 supp.): "The interest in freedom from emotional distress. One who, without privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." See Cantor, supra note 5, for a discussion of this section of the Restatement.


\textsuperscript{63} RESTATEMENT, TORTS \S 46, Comment to Caveats (1948 supp.): "There is not yet a sufficient body of decisions to formulate general rules concerning unintentional invasions of this interest."
Where mental harm is incident to or a consequence of physical injury, the question is not whether liability ensues, but rather to what extent compensation shall be awarded since a cause of action is established by the invasion of bodily security. The issue becomes the proof of harm alleged and the value of the claim.

A more complex and unsettled question is presented when the negligent conduct primarily causes mental disturbance, as for example fright, which is evidenced by or results in physical harm. Until late in the nineteenth century, almost all courts, as do a substantial minority today, denied recovery for mental as well as for consequential physical harm unless the tortious conduct involved a physical impact upon the person of the claimant. Such "contact harm" supposedly guaranteed the genuineness of the mental disturbance. After the mental harm was established as a fact by the impact, it could then be relied upon to furnish a step in the direct chain of causation from the tortious conduct to the bodily harm. The actual physical injury in turn attests to a severity of the emotional disturbance sufficient to warrant compensation.

Text writers and cases differ on the question whether the prevailing majority view requires contact harm in negligence cases. This is understandable. From a review of the case law, it appears that the compensability of mental harm does not turn so much on the stated rule of a given jurisdiction, but is determined by the interpretation of what constitutes the necessary injury or impact. The concept of contact harm has undergone significant changes in the last half century. It has been enlarged to encompass injuries that are "trivial or minor in character," in the full realization that the harm for which compensation...
is sought is unrelated to such injuries, but instead may be "traceable to the peril in which defendant's negligence placed the plaintiff." This concept further has been enlarged to include the injury designated as "shock." It may be true that a physical touching, apparently required by a substantial minority of jurisdictions, furnishes a practical test of compensability. In practice, the enlargement of what may satisfy a contact, has resulted in some instances in achieving a similar result on like facts, under supposedly contrary rules of law. Current holdings defy classification under majority and minority rules. They would be reflected more accurately by saying that recovery may be had for mental harm resulting from either injury or impact upon the person enduring the harm, and that where no substantial physical contact occurs in fact, proof of objective, bodily harm is required. This is a corollary of the general rule that mental suffering will not support a cause of action. This latter rule, in return, is modified to some degree by the interpretation of the nature of physical and mental harm in a given jurisdiction.

suggests: "Were we to follow the minority in requiring some sort of token impact, the impact on the wall on the other side of which Colla was sleeping might well be considered enough."


In Belt v. St. Louis-San Francisco Ry. Co., 195 F.2d 241, at 243 (10th Cir. 1952) the court quotes with approval the following definition of shock given by plaintiff's attending physician who stated that the term shock could denote either 1) a cerebral anemia, or 2) the result of the injury and its effect on the brain. In this case the shock resulted when defendant's train crossed a bridge on which the severely injured person was lying. Note also the concurring and in part dissenting opinion of Mussmano, J., in Potere v. City of Philadelphia, supra note 73, at 104: "However, I wish to state that it can happen that a person would suffer a severe traumatic emotional shock without physical injury or physical impact." See also Smith and Solomon, op. cit. supra note 29, at 122; where shock is defined as a "transient physiological response" as distinguished from a traumatic neurosis which is a "psychological response."

American General Ins. Co. v. Bailey, 268 S.W.2d 528 (Court of Civil Appeals, Texas 1954). In compensation cases the larger industrial states still require a physical impact in the interpretation of what constitutes compensable injury under the applicable statutes. In the Bailey Case, a workman who sustained bruises in an accident in which he saw a co-worker fall to his death, was denied compensation for a subsequent traumatic neurosis. This view has been criticized. See Pound, Comments on Recent Important Workmen's Compensation Cases, 14 NACCA L. J. 47 (1954).

Cf. RESTATEMENT, TORTS §436(2) (1934): "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."

Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909); 24 L.R.A., N.S. 1159; Kaufman v. Western Union Telegraph Co., 224 F.2d 723 (5th Cir. 1955), noted in 34 TEXAS L. REV. 487 (1956). The latter case involved the negligent transmission of a telegram message. In these cases there can be no physical touching.


See note 90 infra for discussion of the context of objective injury.
3. Summary:
Two recent developments in tort law have resulted in a greater protection of the interest in freedom from mental harm. The recognition of a separate, “new,” intentional tort permits compensation for severe emotional distress evidenced by physical harm when caused by aggravated, reprehensible language and conduct. In negligence law, the abolishing of a requirement of direct physical impact as a condition to liability for causing mental harm with resultant physical injury by a majority of the courts has substantially increased the possibility of recovery of damages for injury to the mind. As a result of these changes imposing wider liability, the emphasis in the controversy as to the compensation of mental harm has shifted from the area of liability to that of damages.

B. Rationale of Compensability of Mental Harm:
Recent trends in judicial attitudes, if pursued to their logical extremes, may lead to the imposition of liability “to infinity”\textsuperscript{78} for tortious conduct resulting in mental harm. In effect, there would be imposed on every actor the duty not to expose another to the risk of being emotionally distressed. While recovery for harm sustained may be desirable in the interest of justice to injured persons, it becomes increasingly important to consider what limitations may be placed, in justice and reason, on such potential liability. It is therefore pertinent to consider what limitations may be placed, in justice and reason, on such potential liability. It is therefore pertinent to consider possible limitations on recovery incident to recent principles and to re-examine earlier reasons for denying compensation as to their validity and applicability to present holdings.

Denial of recovery may result from failure to establish a cause of action or from failure to prove the value of the claim. It may also be due to the judicial policy of a given jurisdiction. In negligence cases, unless plaintiff proves that a duty is owed to him by the defendant, liability can not ensue. In jurisdictions following the reasoning of the Palsgraf majority,\textsuperscript{79} the plaintiff must be a person within the risk before a duty toward him can arise. It has been held that, unless the plaintiff be within the zone of danger to his person (not danger to another or to his property), he is not a person within the risk.\textsuperscript{80}

There is conflict on the question whether a person with an unusual susceptibility to injury may be a person within the risk. One view holds that in the absence of defendant’s knowledge of this peculiarity, no duty

\textsuperscript{78} \textit{Prosser, op. cit. supra}, note 52, §48, at 262.
is owed.\textsuperscript{81} Such an idiosyncratic response is a characteristic of the neuroses. The neurotic will sustain harm where a normal individual would not be thus affected under the circumstances. However, there is substantial authority supporting a contrary view,\textsuperscript{82} and in many cases involving a traumatic neurosis the question appears not to have been raised.

A duty can arise only where the interest invaded is one that enjoys legal recognition. When mental harm is brought about by intentional conduct, or when it results from physical impact upon the person and is relatively proportionate to the physical injury, the injury to body and mind is an invasion of a protected interest.\textsuperscript{83} Usually, the concept of pain and suffering encompasses mental harm which common experience has led to be expected from a particular impact.\textsuperscript{84} Medically, pain is classified as a "psycho-physiological phenomenon,"\textsuperscript{85} but in layman's language, and in the sense in which the term has usually been used in law, pain, in the absence of an unusual response, is the disagreeable sensation, resulting from stimulation of the sensory nerves. In this context, pain is "literal pain or anguish or discomfort in the physical sense"\textsuperscript{86} and does not arise independently of physical impact.

The term, suffering, generally has been associated with the emotional response to the injury as a whole; in other words, suffering is


See also, Stewart, Premenstrual Tension in Automobile Accidents, 6 CLEV.-MAR. L. REV. (1957), for a discussion of this unrevealed physical and mental dysfunction.

\textsuperscript{82} See RESTATEMENT, TORTS §312, comment c (1934): "Where, however, the distress is likely to be physically harmful only to a person who has a peculiar sensitivity to emotional strain which is not characteristic of any substantial minority of women or men, the actor is not liable under the rule stated in this section unless he knows or from facts known to him, should realize that the other has or may have such a peculiarity."

Cf. the rule in intentional tort, RESTATEMENT, TORTS §27, comment a (1934): "It is immaterial that, due to the abnormally sensitive reactions of the other, he is put in apprehension by acts which would not have caused such an apprehension on the part of normally constituted persons."

Advanced age and poor physical condition at the time of the accident which contributed to claimant's sustaining a greater injury did not reduce the amount of compensation which was predicated on the actual results of the injury on wage earning capacity in Milwaukee Western Fuel Co. v. Industrial Commission, 245 Wis. 334, 13 N.W.2d 919 (1944). In Peitz v. Industrial Accident Board, 127 Mont. 316, 264 P.2d 709 (1953) it is held that the employer takes the employee subject to his physical condition at the time he enters employment.


\textsuperscript{84} OLECK, op. cit. supra note 66, at ch. 15; Dodson v. Cobb, 92 Ga.App. 654, 89 S.E.2d 552 (1955), (there is a presumption of law that bodily pain and suffering results from personal injury).

\textsuperscript{85} CANTOR, op. cit. supra note 5, at 404. See also Flaxman, Pain, 3 MED. TRIAL TECH. Q. 51 (1957).

\textsuperscript{86} Rodgers v. Boynton, 315 Mass. 279, 52 N.E.2d 576 (1943).
the impact on the mind occurring simultaneously with either physical or mental injury. In this sense suffering includes "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, and indignity, as well as physical pain."87

Thus it may be seen that pain and suffering may encompass not only normal responses but also symptoms of the neuroses. However, unless the neurotic components are specially alleged as part of the damages, no particular proof is required for the compensation of pain and suffering.88

In jurisdictions permitting recovery where no direct physical impact occurred in fact, the courts look to the "nature of the results,"89 that is to say, to the evidence of the harm sustained to determine whether there has been an invasion of bodily security sufficiently severe to warrant recognition, and to permit a finding that a duty is owed. "Physical injury" is almost universally required and recognized as proof of the reality and severity of the mental harm.90 Physical injury may follow as a consequence of the mental distress, as for example heart failure,91 skull fracture,92 or the so-called psychic miscarriage.93 Physical disability may also be the objective aspect of the emotional state, as for example hysterical paralysis, anesthesia, or emaciation resulting from neurotic gastro-intestinal disturbances.94 Injuries of the latter type have no demonstrable origin in organic pathology and differ from those organically caused. A paralysis due to injury of the nervous tissue will almost invariably be of a permanent duration. Hysterical paralysis may disappear spontaneously, or on successful treatment of the emotional conflict, provided no serious damage has resulted from the disuse of the muscles involved. A distinction between physical and mental injury based strictly on the objective nature of the symptoms ignores these differences which may have legal consequences. It may also result in a denial of recovery where a traumatic neurosis involves a behavioral reaction characterized by phobias, anxiety, or dissociation, even though these subjective aspects of the neurosis cause severe

90 RESTATEMENT, TORTS §436 (1934).
91 Colla v. Mandella, 1 Wis.2d 594, 85 N.W.2d 345 (1957).
92 Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931); Hall v. Doremus, 12 N.Y. Misc. 319, 171 Atl. 781 (1934) (claimant fainted at "unsightly scene of calf being born hind quarters first").
93 Pankopf v. Hinkle, 141 Wis. 146, 123 N.W. 625 (1909). But see Note, Tort Liability for Miscarriage "Caused" by Fright, 15 CHI. L. REV. 188 (1947), questioning the causal relationship between emotional states and premature termination of pregnancy in the absence of direct violence.
94 See notes 16, 17, 51 supra.
anguish and incapacity. A few recent decisions take a broader view of what constitutes physical injury. In effect, these holdings tend to obliterate the medically artificial distinction between physical and mental, and also qualify the rule that mental suffering will not support a cause of action. Under this latter view, the action may be maintained and the evaluation of the “nature of the results” bears on the valuation of the claim rather than on the issue of liability.

Assuming that liability is established by a finding of duty and delict, the further requirement of causation must be met. In traumatic neurosis, the defendant’s conduct may be responsible for the onset of overt symptoms of an already existing impairment. Medicine attributes the cause of this impairment to emotional conflicts antedating the trauma brought about by the tortious conduct and considers the trauma merely a precipitating factor of but a part of the course of the disorder. Nevertheless, legal causation in fact requires only that the harm would not have been sustained but for the defendant’s act, and under this principle the tortious conduct may be considered as a substantial factor in bringing about the plaintiff’s harm. In respect to the element of causation, the defendant is usually held responsible for all unforeseeable consequences of his negligent act, including those resulting because of a concealed physical condition such as pregnancy and latent diseases such as heart disease and the neuroses.

"It cannot be overemphasized that the human body can through negligence of others suffer injury in only two ways: (1) by physical impact, and (2) by shock, through the senses to the nervous system. A person can suffer both at the same time or he can experience one alone. In either event, actionable mental suffering may result." Espinosa v. Beverly Hospital, 250 Cal.App.2d 220, 249 P.2d 843 (1952). "...[D]efinite nervous disturbance or disorder caused by mental shock and excitement are classified as physical injuries and will support an action for damages." Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954).


Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 21 (1955); Colla v. Mandella, 1 Wis.2d 594, 85 N.W.2d 345, 347 (1957) where the court sets out the events in the chain of causation: "...[T]he truck rolled down the hill and crashed into Colla's house near the place where he was sleeping, the crash made a loud noise, the noise frightened Colla, the scare caused his heart to falter and fail and thus caused his pain, suffering and death and the other damages. Thus, the negligence was a substantial factor in producing the injuries, and therefore a proximate cause of them, even though Mandella neither foresaw, nor should have foreseen the extent of the harm or the manner in which it occurred."

See also Auerbach, Causation: A Medico-legal Battlefield, 6 CLEV.-MAR. L. Rev. 209 (1957); Small, Gaffing at a Thing Called Cause: Medico-legal Conflicts in the Concept of Causation, 31 TEXAS L. Rev. 630 (1953).

Repelement, Torts §461 (1934): "The negligent actor may be liable for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct." Jonte v. Key System, 39 Cal.App.2d 654, 201 P.2d 562 (1949).
The "substantial factor" doctrine has also obviated arguments favoring failure of causation because mental harm such as traumatic neurosis may be too remote or too extraordinary a consequence of the tortious conduct unless it is so in fact as to time and space. Furthermore, such objections are not consistent with medical knowledge of mental harm and mental disorders.

One other consideration with reference to traumatic neurosis is pertinent in the area of causation. When dealing with a neurotic response to an injury, especially when secondary gain factors are components of the dynamic source of the neuroses, as for example in compensation neuroses, there should be careful analysis of possible independent, intervening factors. Tortious conduct need not necessarily be considered a substantial factor in bringing about an incapacity which would not have occurred but for the unconscious desire for compensation. 98

The scope and ultimate definition of duty and causation, in the last analysis, are expressions of judicial policy. Holding that any given harm is not proximately caused, or that a person, or a harm is not within the risk may prove logically to be an untenable legal or medical position. Such a view has been criticized as "begging the question" 99 by the Wisconsin Supreme Court which takes the position that "The determination to deny liability is essentially one of public policy rather than of duty and causation."100 Recovery may also be denied on the ground of public policy notwithstanding a finding of causation in favor of the plaintiff because in the opinion of the court the injury may be:

"... 'wholly out of proportion to the culpability of the negligent tortfeasor,' or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or because allowance of recovery would place too unreasonable a burden upon users of the highway, or be too likely to open the way to fraudulent claims, or would enter a field that has no sensible or just stopping point." 101

When a cause of action is established, the burden remains on the plaintiff to prove the value of his claim. When traumatic neurosis follows as a consequence of physical injury, it has frequently, particularly in older cases, been merged in the damages as a component of pain and

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99 Compare the effect of a hidden peculiarity of the plaintiff with respect to the element of duty, note 82 supra. And see Smith and Solomon, supra note 29, at 91: "Compensation of neurosis following trauma as a new and original injury is . . . legally erroneous and socially unjust."

100 Id. at 348.

101 Ibid.
suffering, while its objective manifestations were treated as part of the physical injury. In these instances no attempt has been made to establish a recognizable mental disorder. Instead, characteristic symptoms such as hysterical paralysis, anxiety state, nervousness or sleeplessness have been alleged has part of the harm sustained. Of course, that is not to say that every allegation of nervousness or anxiety necessarily indicated the existence of a neurosis. Where, however, traumatic neurosis is claimed as a compensable element of the personal injury, particularly where the mental harm is markedly disproportionate to the physical harm, or the response is one that could not reasonably be anticipated as a result of the total occurrence constituting the tortious conduct, the better view requires competent expert testimony as to the intensity, degree, duration and resultant incapacity of any harm of a subjective nature. In proper cases, psychiatry is prepared today to give substantiating evidence of mental harm and mental disorders, based on accepted methods of diagnosis and observation.

The reported cases, involving instances of traumatic neurosis, show wide variations in the amounts of damages and compensation awards in the various jurisdictions.

In personal injury actions, a tortfeasor must, as a general rule, compensate for all consequences of his act and cannot invoke a previous condition to reduce the amount of damages. There is authority, however, that damages be apportioned where several causes, faulty or innocent, contribute to bring about the harm. It has been suggested

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102 See notes 44, 17 supra.
104 NOYES, op. cit. supra note 2, at 452.
105 Compensation award of $88,666 where claimant was struck by baggage car. Disability consisted of pain in neck, lower back, headaches, muscular spasms, boot-like anesthesia. Chicago, Rock Island & Pacific Railway Co. v. Kifer, 216 F.2d 753 (10th Cir. 1954). Damages in the amount of $12,259.18 awarded to badly bruised plaintiff who suffered from an anxiety state with considerable emotional difficulty for many weeks. Sexton v. Key System Transit Lines, 144 Cal.App.2d 719, 301 P.2d 612 (1956). Damages of $125,000 awarded to plaintiff who was severely injured. At time of trial there was evidence of backache, difficulty in walking, severe headaches, impotency and psycho-neurosis “which will increase as time goes on and may result in a breakdown.” (Cf. Smith and Solomon, supra note 29, at 127: “Traumatic neurosis cannot be regarded as a permanent disability.”) $100,000 of the verdict was allocated to compensate for the injuries, for the pain and suffering and for loss of earning power. The latter was computed at $79,200. Sullivan v. City & County of San Francisco, 95 Cal.App.2d 745, 214 P.2d 82, 91 (1950). $7,000 was considered excessive for traumatic neurosis with minor physical injuries. This was reduced to $4,500 in Landrath v. Allstate Insurance Co., 259 Wis. 248, 48 N.W.2d 485 (1951). Severely injured plaintiff who suffered great pain and was highly nervous, melancholy and discouraged nine months after the accident had been awarded $5,000 for pain and suffering. The court held in finding this amount excessive that, “... a jury, properly actuated and upon due consideration would be likely to assess the damages for pain and suffering in the instant case, at not less than $1,500 or more that $3,000. Butts v. Ward, 227 Wis. 387, 405, 279 N.W. 6 (1938).
106 PROSSER, op. cit. supra note 71, §48. 15 AM. JUR., Damages §80, 81 (0000).
107 Moore v. Tremelling, 100 F.2d 39 (9th Cir. 1938); Gates v. Fleischer, 87 Wis.
that this rule, by analogy, be applied to instances of mental harm such as traumatic neurosis which involve a pre-traumatic impairment. In workmen's compensation actions, particularly where the pre-existing condition was shown to be more than a latent tendency, a few jurisdictions approve apportioning awards in cases of traumatic neurosis between damages due to the accident and those attributable to the prior neurotic condition, thereby limiting compensation to the extent of the aggravation of the impairment.

IV. CONCLUSION

Compensation for mental disturbance such as traumatic neurosis is being demanded and granted with increasing frequency. This may be due to a number of causes, such as the relatively high incidence of the neuroses in the general population; the numerous anxiety producing factors inherent in the daily life of our complex, charged-with-tension society; the identification by medicine of the distinct entity of these mental disorders, their etiology, symptomatology, prognosis and therapy; and changing judicial attitudes toward the compensability of mental harm in general.

Notwithstanding the general rule that the interest in peace of mind is not protected against invasion by negligent conduct, recent cases involving the compensation of harm following psychic impact indicate a trend which may lead to the independent recognition of this interest in negligence, as it has been recognized in intentional tort. In effect, this accords protection to the personality as a whole and reflects philosophical as well as scientific concepts of the nature of man.

In view of the transitional state of the law, legal concepts as to the nature of trauma, pain and suffering, physical injury and mental injury require clarification to avoid ambiguity and inconsistency with scientific fact. The mental states have both objective and subjective aspects particularly significant in instances of traumatic neurosis. Either aspect may result in severe anguish, impairment and incapacity.

Whenever an alleged mental or physical disturbance seems to be unusual, out of proportion to the impact of the tortious conduct, or unrelated to the expected physical injury, the presence of traumatic neurosis should be suspected and every effort be made to confirm or


108 Smith and Solomon, supra note 29, at 133, 134.

In Ashland Limestone Co. v. Wright, 294 S.W. 149, 219 Ky. 691 (1927), the Board in effect "separated the results of pre-existing disease from those of the accidental injury, as the evidence discloses that the appellee is totally disabled, and the board found that 50% of his disability is due to the accident. The disability due to traumatic neurotic condition amounted to 50%. Accord: Smith v. Essex County Park Commission, 15 N.J. Misc. 227, 190 Atl. 45 (1937); Moray v. Industrial Commission, 58 Utah 404, 199 Pac. 1023 (1921); Sykes v. Republic Coal Co., 94 Mont. 239, 22 P.2d 157 (1933).
rule out such a diagnosis by submitting the problem to a qualified psychiatrist. To the plaintiff the importance of such a diagnosis lies in establishing the presence of a "recognizable mental disorder," known to afflict a "substantial minority" of people, thereby ruling out esoteric responses and malingering. The defendant may further his cause by demonstrating the unusual susceptibility to harm, the aggravation of an existing impairment, and the many factors, of which trauma is only one, operative in the production of a neurosis.

When confronted with traumatic neurosis as an element of the harm sustained, the lawyer is faced with special problems. He must sufficiently understand the technical concepts and language involved. He must be able to translate these terms into language meaningful to the trier of facts and yet preserve their accuracy. He must further be prepared to face honest differences of opinion among the experts. In the interpretation of predominantly subjective phenomena, each specialist is conditioned by the views of the school in which he was trained, as well as by his personal attitudes and experience. It will be found, however, that there is general agreement as to the psychogenic origin of the neuroses, and as to the involuntariness of their symptoms, difficult as an acceptance of such concepts may be for the lay public. The question of malingering may be particularly troublesome. Here, too, the experts may differ in good faith due to influences in their background and experience.

One objection to the legal recognition of subjective, intangible harm raised today, is the possibility of "vexatious and fictitious" claims. This objection may be met to some degree by a requirement of competent proof of the alleged harm. Here it is hoped that further progress in medicine and particularly in psychology and psychiatry will furnish a greater degree of certainty by demonstrating tangible physiological and anatomical changes incident to the psychological processes involved in emotional states. As competent proof is forthcoming to support claims of mental harm resulting from impact tortiously caused, there is correspondingly less justification to deny compensation for the disability of mental harm while allowing it for physical injury occurring under similar circumstances.

110 See Loria, Traumatic Neurosis, 35 Mich. S.B.J. 38 (1956) for an informative article to aid lawyers in evaluating a neurotic individual. The author lists the following check points: inappropriate response, personality changes, bizarre symptomatology, metastasis of symptoms, shopping for lawyer, shopping for doctor, accident proneness, garrulousness, proving something other than financial interest, circumstances of particular stress situation, symbolic injury, disease frequently associated with emotional factors, armed forces status, history of institutionalization, stability in family relationships, migratory worker, criminal record, relationship with spouse, prolific writer, and actual medical report.

111 See Restatement, Torts §905, comment i, supra note 25, and 312, comment c, supra note 82.

112 Prosser, op. cit. supra note 54, §37, at 177.
Possible limitations on liability and on the amount of damages recoverable for mental harm such as traumatic neurosis deserve consideration. In intentional tort, liability for invasion of mental tranquillity is conditioned on the character of the defendant’s conduct. In negligence, the primary condition imposed on recovery is an objective manifestation of the state of mind or a consequential physical injury. Predicating liability on the objective nature of the harm sustained may lead to what an older view rejected as creating a cause of action in favor of the specially predisposed claimant while denying it to the normally constituted, equally situated person. This result may be avoided to some degree by giving greater weight in the initial determination of liability to the total occurrence constituting the tort, that is, to the circumstances occasioning the mental harm, such as the imminence of personal danger creating the psychic trauma for which compensation is sought. Weight to be accorded to the various factors spelling liability is within the realm of judicial policy in determining standards of conduct. Policy may further consider the economic and social consequences of the burden of potential liability on every actor resulting from an extension of compensability of mental harm in personal injuries.

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113 Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898).

114 "The fundamental idea of liability for wrongful acts is that upon a balancing of the social interests involved in each case, the law determines that under the circumstances of a particular case an actor should or should not become liable for the natural consequences of his conduct." Osborne v. Montgomery, 203 Wis. 233, 234 N.W. 372 (1931).