

## RECOVERY FOR MENTAL ANGUISH IN OHIO

### *Tuttle v. Meyer Dairy Products*

75 Ohio L. Abs. 587, 138 N.E. 2d 429 (App. 1956)

Plaintiff purchased a carton of cottage cheese from the defendant company. While eating some of this cheese, she bit upon a piece of glass, which she expelled from her mouth without cutting or scratching herself. Plaintiff developed nausea and suffered nervousness and mental anguish for the next few days as a result of this incident. The jury found that the plaintiff's fright and mental anguish were the proximate result of the defendant's negligence, and awarded the plaintiff \$1500. The Cuyahoga County Court of Appeals reversed the judgment and held that in the absence of a contemporaneous physical injury, a seller of food is not liable for fright, apprehension or mental anguish suffered by a purchaser who finds a foreign substance in the food.

It is generally held that mental disturbance alone is not compensable<sup>1</sup> unless caused by a willful or intentional act.<sup>2</sup> But a multiplicity of theories, exceptions and distinctions confuse this area of recovery when the defendant is alleged to have been merely negligent. The "concurrent injury" theory is followed by a minority of jurisdictions, including Ohio.<sup>3</sup> This theory in effect requires that a physical injury, however slight, must occur contemporaneously before any damages may be recovered for mental disturbance.<sup>4</sup> The majority of American jurisdictions follow the "impact theory," which requires a mere impact, touching, or physical contact before recovery may be had for the mental disturbance.<sup>5</sup>

The impact and concurrent injury theories provide a similar result where there is a slight physical injury.<sup>6</sup> The distinction becomes decisive

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<sup>1</sup> Southern Express Co. v. Byers, 240 U.S. 612 (1916); Chandler v. Ill. C.R. Co., 256 Ill. 259, 100 N.E. 152 (1912); Kalan v. Terra Haute & I.R. Co., 18 Ind. App. 202, 47 N.E. 694 (1897); Buchanan v. Stout, 123 App. Div. 648, 108 N.Y. Supp. 38 (1908); Annot., 56 A.L.R. 657 (1928); 52 AM. JUR., *Torts* §78 (1944); 15 AM. JUR., *Damages* §175 (1938).

<sup>2</sup> Wright v. Beardsley, 146 Wash. 16, 89 Pac. 172 (1907); 15 AM. JUR., *Damages* §179 (1938).

<sup>3</sup> Miller v. Baltimore & O.S.W.R. Co., 78 Ohio St. 309, 85 N.E. 499 (1908); Davis v. Cleveland R. Co., 135 Ohio St. 401, 21 N.E. 2d 169 (1939); Bartow v. Smith, 149 Ohio St. 301, 78 N.E. 2d 735 (1948); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).

<sup>4</sup> Block v. Pascucci, 111 Conn. 58, 149 Atl. 210 (1930); Morton v. Stack, *supra* note 3.

<sup>5</sup> Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N.E. 737 (1902); Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931); Smith v. Montclair Brown & White Cab Co., 6 N.J. Misc. 57, 139 Atl. 904 (Sup. Ct. 1928); Clark Restaurant v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931).

<sup>6</sup> Clark Restaurant v. Rau, *supra* note 5. Plaintiff swallowed a particle of glass in food served by defendant which passed safely out of his body, though causing mental stress and anxiety. The court said, "this fact itself establishes an injury even though there be no other injury."

in cases where the "injury" is little more than a technical touching.<sup>7</sup> Underlying both theories is a realization of the difficulty of proving (or disproving) the existence of an injury as intangible as fright or mental disturbance. The difficulty of proof, raising the fear of false and fraudulent claims, apparently leads the courts to require physical contact or injury as a means of providing some assurance of validity to the claim.<sup>8</sup> In cases where this assurance must be actual physical injury,<sup>9</sup> the question arises whether the impact is injury *per se*. The Supreme Judicial Court of Massachusetts, faced with this question, apparently strained to impute an injurious character to a mere impact in order to allow recovery.<sup>10</sup>

The court in the instant case based its decision on the concurrent injury theory, first enunciated in Ohio in *Miller v. Railroad Co.*<sup>11</sup> and followed in *Davis v. Cleveland Ry. Co.*<sup>12</sup> In the *Miller* case, the plaintiff was frightened when a train fell onto her property *near* where she was standing; there was neither physical injury *nor* impact.

The authority relied upon in *Miller* cannot be regarded as adequate support for the concurrent injury rule since there was no impact of any sort in two of the cases.<sup>13</sup> A third case had already been overruled,<sup>14</sup> and a fourth case involved an intervening proximate cause.<sup>15</sup> One common and distinctively significant element of the remaining cases cited is that they did not involve impact or personal contact of *any kind*.

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<sup>7</sup> *Porter v. Delaware L. & W. R. Co.*, 73 N.J.L. 405, 63 Atl. 860 (Sup. Ct. 1906) (dust in the eye); *Smith v. Montclair Brown & White Cab Co.*, *supra* note 5, (shaking-up of plaintiff in an automobile); *Homans v. Boston Elevated Ry. Co.*, *supra* note 5, (slight jolt); *Comstock v. Wilson*, *supra* note 5 (slight physical impact accompanied by shock).

<sup>8</sup> PROSSER, TORTS §37, p. 178-180, (2d ed. 1955).

<sup>9</sup> *Miller v. Baltimore & O.S.W. R. Co.*, *supra* note 3.

<sup>10</sup> *Homans v. Boston Elevated Ry.*, *supra* note 5, where the court referred to the negligent jolting received by plaintiff as a battery, notwithstanding the absence of intent. It then concluded that the fright and the battery concurred in producing the disability, thereby making it unnecessary to determine which was the actual cause; also see note 6, *supra*.

<sup>11</sup> 78 Ohio St. 309, 85 N.E. 499 (1908).

<sup>12</sup> 135 Ohio St. 401, 21 N.E. 2d 169 (1939).

<sup>13</sup> *Smith v. Railway Co.*, 23 Ohio St. 10 (1872), plaintiff was ejected from defendant's train and sought recovery for insult and embarrassment. *Morton v. Western Union Telegraph Co.*, 53 Ohio St. 431, 41 N.W. 689, (1895), involved failure of defendant's company to deliver a death message to plaintiff. Today, such circumstances provide a basis for recovery in many jurisdictions; *Mentzer v. Western Union Telegraph Co.* 93 Iowa 752, 62 N.W. 1 (1895); *Gillespie v. Brooklyn Heights Ry. Co.*, 178 N.Y. 347, 70 N.E. 857 (1904); *Annot.*, 23 A.L.R. 361, 372 (1923).

<sup>14</sup> *Victorian Ry's Commissioners v. Coultas*, 13 App. Cas. 222 (1888), had been overruled in its own jurisdiction by *Dalieu v. White & Sons*, 2 K.B. 669 (1901), prior to the time the *Miller* court cited it.

<sup>15</sup> *Scheffer v. Washington City, V. M. & J.S.R.R.*, 105 U. S. 249 (1882). The intervening insanity of plaintiff broke the proximity chain between the original

In the Davis case, Judge Zimmerman speaking for the Court discussed the *Miller* case in these terms:

The rule in the *Miller* case has been recognized as the law of Ohio for more than thirty years and is supported by abundant and respectable authority. A majority of the present members of the court, being mindful of the doctrine of *stare decisis*, are of the view that it should not now be overruled.<sup>16</sup>

A closer consideration of the authority supporting *Miller* should perhaps have softened the Court's strict adherence to *stare decisis* in affirming this restrictive rule of recovery.<sup>17</sup> In the present case, the court cited *Wolfe v. Great A & P Tea Co.*<sup>18</sup> which held that when the plaintiff became nauseous from eating peaches from a can after noticing worms in the syrup, the question of whether or not a physical injury occurred was a question of fact for the jury. The instant Court, by making the questionable distinction that if *all* the glass were removed from the carton of cheese, the cheese would become perfectly edible, removed the question of injury from the jury's consideration.

There are, however, broader grounds for reconsidering the current Ohio rule on mental anguish. The human abnormality which the courts term "mental injury" has definite physiological effects and in one sense is a "physical injury."<sup>19</sup> It is established law that a peaceful mental state is entitled to protection.<sup>20</sup> The protection of peace of mind is the stated or tacit basis for allowing recovery for invasion of privacy, assault, malicious prosecution, defamation, false arrest, and certain nuisances. This invasion of mental quietude as a distinct and separate aspect of legal liability is significant in light of this analysis of legal history:

The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will . . . tomorrow

fright and his subsequent death. Also cited was *Gulf, Colo. & S.F. Ry. v. Trott*, 86 Tex. 412, 25 S.W. 419 (1894) and it is worth noting that although recovery was denied, Texas was one of the first jurisdictions to allow recovery for mental damages without physical injury; *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890).

<sup>16</sup> 135 Ohio St. 401-407; 2 N.E. 2d 169-172 (1939).

<sup>17</sup> In both *Davis v. Cleveland Ry. Co.*, *supra* note 3, and *Bartow v. Smith* *supra* note 3, Judge Zimmerman disputed that part of the *Miller* rule which denies recovery for subsequent physical injuries. Also, in the *Bartow* case, Judge Hart expresses strong dissent and clearly suggests that many courts are taking the more modern view in allowing recovery more frequently without contemporaneous physical injury.

<sup>18</sup> 143 Ohio St. 643, 56 N.E. 2d 230 (1944).

<sup>19</sup> Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1921-22); Bohlen and Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance*, 32 COL. L. REV. 409 (1932), and *Liability in Pennsylvania for the Physical Effects of Fright*, 80 U. PA. L. REV. 627 (1932); PROSSER, *TORTS* §56 2d ed. (1955); Ellison, *Recovery for Mental Suffering in Louisiana*, 15 LA. L. REV. 451 (1954-55).

<sup>20</sup> RESTATEMENT, *TORTS* §47(b) (1939).

be recognized as an independent basis of liability.<sup>21</sup>

As stated initially, mental harm alone is compensable when caused intentionally; why, then, distinguish the injury on the basis of the defendant's action? If the court is concerned with proof and corroboration, there appears to be no valid basis upon which to distinguish negligently caused mental harm and intentionally caused mental harm.

Recovery for "pain and suffering" is not an insignificant element of damages in the ordinary personal injury case. If the courts feel that they have sufficient means to control the amount of recovery for this variety of mental disturbance, what valid line of judicial control distinguishes recovery for mental injury alone? The absence of a precise pecuniary standard (such as market value) in measuring pain and suffering in a simple negligence case or in a case of intentional mental injury is apparently no longer troublesome.<sup>22</sup>

The difficulty of proving mental disturbance without any physical injury or impact affords little reason for denying the opportunity to make such proof.<sup>23</sup> When recovery is denied for reasons of expediency or simplicity, we may be observing "a pitiful confession of incompetence on the part of courts of justice."<sup>24</sup> The Supreme Court of Wisconsin, in a recent decision allowing recovery for mental disturbance *without impact* under circumstances nearly identical with the *Miller* case, stated:

The courts are getting away from the requirement of physical impact to sustain liability in fright and shock cases, and the majority no longer require impact, while those courts which retain the impact requirement go very far in finding sufficient impact from the most trivial contact.<sup>25</sup>

A similar ruling was recently handed down by the Arizona Supreme Court.<sup>26</sup>

The principal case represents a questionable application of the extreme rule enunciated in the *Miller* case. The present Ohio court need not have adopted the liberal "no impact" rule to have sustained the jury verdict in the instant case. The need for progress in this area of the law should be evident. The present Ohio rule, resting on doubtful authority, denying meritorious claims, and forcing irrational distinctions does not comport with the present day conceptions of the extent of legal protection which should be afforded the individual.

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<sup>21</sup> STREET, *THE FOUNDATIONS OF LEGAL LIABILITY*, 470 (1906).

<sup>22</sup> *Brent v. Morgan*, 221 Ky. 765, 299 S.W. (1927).

<sup>23</sup> It should be noted that the plaintiff in the instant case won in the trial court.

<sup>24</sup> *Simone v. R.I. Co.*, 28 R.I., 186, 195, 66 Atl. 202, 206 (1907); *Chinchiolo v. New England Wholesale Tailors*, 84 N.H. 329, 150 Atl. 540 (1930).

<sup>25</sup> *Colla v. Mandella*, 85 N.W. 2d 345, 347 (Wis. 1957).

<sup>26</sup> *Crystal Coca-Cola Bottling Co. v. Cathey*, 317 P. 2d 1094 (Ariz. 1957).