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TORTS: LIABILITY FOR NEGLIGENTLY INDUCED EMOTIONAL DISTURBANCE

_Colla v. Mendella, 1 Wis.2d 594, 85 N.W.2d 345 (1957)_

Defendant negligently permitted his truck to crash into decedent's home adjacent to the room in which he was sleeping. Decedent, who had a history of heart trouble, awoke, suffered severe fright, and died ten days later. Decedent's wife sued to recover for his death. The trial court denied defendant's motion for summary judgment. On appeal, held, impact is not necessary to a cause of action for physical injury resulting from fright alone. Order affirmed.

In few areas of human activity does the language of the past haunt the wisdom of the present so effectively as in law. In a time of medical and psychological sophistication in mind-body relationships, a large minority of American courts, including Florida, still refuse recovery for physical injuries resulting from negligently induced fear or emotional disturbance unless accompanied by physical impact. In the absence of physical injury, American courts still refuse to allow any recovery for negligence resulting in emotional disturbance.

A majority of jurisdictions, reasoning as in the instant case, permit recovery for physical injuries when the provoking emotional disturbance sprang from plaintiff's fear of personal injury. But, if in the instant case the emotional disturbance of plaintiff's husband

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4. The Black Gull, 82 F.2d 758 (2d Cir. 1936); Davis v. Cleveland Ry., 135 Ohio St. 401, 21 N.E.2d 169 (1939); Wedgworth v. Fort Worth, 189 S.W.2d 40 (Tex. Civ. App. 1945); Prosser, Torts §37, n.24 (2d ed. 1955); Restatement, Torts §§313, 436 (2) (1934). _But see_ Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla. 1950), holding that recovery will be granted for mental disturbance even in the absence of physical injury "where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages."
had sprung exclusively from fear for her safety, only a minority of jurisdictions would have permitted recovery.\(^6\) Despite the obvious significance to the victim of threats to his kin and the persuasiveness of pleas by eminent legal theorists for allowing recovery in these situations,\(^7\) a majority of American courts refuse.\(^8\) Further, should a court decide that the emotional disturbance of a decedent was caused exclusively by fear for his property, the court would almost certainly deny recovery.\(^9\)

Historically, the courts, emerging from a relatively poor, land-centered world into a lush overgrowth of solvency and new standards of social responsibility, were at first inclined toward the impact requirement.\(^10\) By approximately 1916, however, the trend had been reversed.\(^11\) In the search for arguments that would permit relief, the first break-throughs came with the discovery of special duties owed to patrons by public carriers and innkeepers,\(^12\) with the recognition of mere token impact,\(^13\) with a willingness to forego impact in the face of wanton and willful negligence or intentional emotional disturbance,\(^14\) and with a willingness to trace injuries to such established torts as trespass.\(^15\)

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\(^7\)Dulieu v. White & Sons, 2 K.B. 669, THE LAW TIMES 129 (1901), refers to criticism by Mr. Sedgwick, Sr. Frederick Pollock, and Mr. Bevan of failure to recognize the significance of threat to others. See also Prosser, Torts §37, n.40-45 (2d ed. 1955).

\(^8\)E.g., Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Carey v. Pure Distributing Corp., 139 Tex. 31, 124 S.W.2d 847 (1939); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).


\(^13\)See notes 21, 22, 23, 24 infra.

\(^14\)Crane v. Loftin, 70 So.2d 574 (Fla. 1954); Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950); Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1939).

\(^15\)Yoakum v. Kroeger, 27 S.W. 953 (Tex. 1894); Chicago & N.W. Ry. v. Hunner-
Medical authorities no longer doubt that a mental shock may result in serious physical injury under relatively common circumstances. Why, then, do some jurisdictions persist in requiring impact? Is it a hearty contempt for those so weak-willed as to let themselves be injured by what they "see"? Is it perhaps a fear that the injury is merely "mental" or, even worse, that the injury is faked?

Since the courts that permit recovery do so only when it is determined that there is actual, consequential physical injury, as evidenced by modern medical diagnostic techniques and determined as a matter of fact by the jury, to persist in requiring impact appears to be a foolish formalization of relief requirements similar to that undergone by the common law forms of action in the sixteenth century. After all, the impact rule itself has permitted a strained casuistic approach:

18White, Trauma, Stress and the "Arteriosclerotic" Heart (Coronary Heart Disease), in Med. Trial Tech. Q. 1956 Annual 135 (1956); Wolff, Life Stress and Bodily Disease in 1 Weider, Contributions Toward Medical Psychology 315 (1953).


20As an example of mossbackism at its fuzzy best, note this quote from Huston v. Freemansburg Boro., 212 Pa. 548, 61 Atl. 1022 (1905): "The industry of counsel in the present case has furnished us with a few other cases favorable to his contention. But they do not show any sound reason for a change of our view. All of the cases are of recent and unhealthy growth, and none of them stands squarely on the ancient ways. In the last half century the ingenuity of counsel, stimulated by the cupidity of clients and encouraged by the prejudices of juries, has expanded the action for negligence until it overtops all others in frequency and importance, but it is only in the very end of that period that it has been stretched to the effort to cover so intangible, so untrustworthy, so illusory and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of the large proportion of exaggeration and even of fraud in the ordinary action for physical injuries from negligence, and if we opened the door to this new invention the result would be great danger, if not disaster to the cause of practical justice . . . ."

Although Huston v. Freemansburg Borough is still the law in Pennsylvania, criticism finally appeared in 1957 when Erwin, J., in Bosley v. Andrews, 184 Pa. Super. 396, 135 A.2d 690, suggested in a dissenting opinion that the rule resulted in questionable justice. The liberal Pennsylvania courts have cited the Huston case 15 times and the case from which the rule was derived, Ewing v. Pittsburgh C. & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892), 20 times without criticism.

21See note 4 supra.

22ZANE, THE STORY OF LAW 289 (1927): "Sometime between 1500 and 1560
try in application. The courts have recognized dust in the eye, smoke in the lungs, numerous jars and slight falls, and a horse's evacuation of its bowels into plaintiff's lap as impact sufficient to impose liability. This is simply evidence of the courts' laboring toward justice in the chains of an outmoded legal technicality.

So the movement, from nineteenth-century indifference to mental suffering and suspicious refusal to allow recovery for damages resulting from mental pain and anguish toward a more sophisticated recognition of causal relationships between the body as receptor of stimuli and the body as an effective organ of neutral responses to these stimuli, has been slow and hampered by the law's primitive, dualistic view of the body and its "mind." Persuasive and perceptive authorities have long argued for recognition of mental suffering and its effects, but legal progress is a deliberate beast. To the extent of economic feasibility and to the extent that the costs of liability can be effectively distributed or hidden, gradual progress will probably continue to be made toward protecting the innocent victims of negligent acts.

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came in another great change in the face of the law. The old system of oral pleading before the court was changed to the present system of putting in written pleading. . . . The change was exceedingly unfortunate. The system was of iron. A variance between the declaration and the proof was fatal."


22Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).

23E.g., Block v. Pascucci, 111 Conn. 58, 149 Atl. 210 (1930) (plaintiff fell to ground after fainting); Louisville & N.R.R. v. Roberts, 207 Ky. 310, 269 S.W. 333 (1925) (plaintiff, living in railroad box car, jarred and shaken when owners attempted to eject her by ripping her porch off the car and jacking the car up); Southern Ry. in Kentucky v. Owen, 156 Ky. 827, 162 S.W. 110 (1914) (boy carried along by water from burst water tank jarred and shaken up).


25See note 10 supra.