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The Development of the Rule of Damages for Fright in New York

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In accordance with this rule, the order of the court below, which authorized the erection of a gasoline station, was affirmed as modified by a direction that when the circumstances become so changed by the development of the city that the property is reasonably susceptible of being applied to business uses, then, upon the application of the authorities or anyone interested, the gasoline station must be removed.

Discussing the constitutionality of zoning laws, the court said:

> "Law is applied to facts, and as the facts change in the process of time the law adapts itself accordingly. That which may be unconstitutional today may be legal years hence * * *." [17]

This language, noble though it be, was mere dicta since the constitutionality [18] of zoning restrictions was not in issue in this case. Whether it is evidence of a growing tendency for the formulation of a realist jurisprudence [19] remains to be seen. Meanwhile, pity the fact that such words are only dicta instead of forming a part of a decision upholding the constitutionality of some great social enactment.

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THE DEVELOPMENT OF THE RULE OF DAMAGES FOR FRIGHT IN NEW YORK.

The question as to whether damages are recoverable for fright and for nervous shock has been the subject of legal controversy since 1888 when the Court in *Victorian Railways Commrs.* v. *Coultas* [1] decided that there could be no recovery for damages resulting from fright. Before many years had passed the doctrine of that case was practically overruled,[2] and in 1925 the case of *Hambrook* v. *Stokes Bros. Ltd.*[3] liberally extended the doctrine of recovery of damages for fright as it then existed in England.

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[17] *Supra* note 3 at 82, 177 N. E. at 315.

[18] For a discussion of the constitutionality of zoning laws, see Weisman, *Zoning Administration in New York City, supra* note 13.

[19] Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697.

[1] 13 App. Cas. 222 (1888).

[2] Dilieu v. White, 2 K. B. 669 (1901).

[3] 1 K. B. 141 (1925). The plaintiff was allowed to recover for the death of his wife brought about by reason of the severe shock she suffered in witnessing the defendant's motor lorry negligently strike her daughter. It was said plaintiff could recover, although his wife had not been shocked by a fear of injury to herself, provided shock resulted from what she saw or realized, rather than that which someone told her.

In the United States the cases which involve this question have resulted in varied determinations [4] and the subject has been treated extensively by the foremost legal writers in the field of torts.[5]

In New York State, *Mitchell* v. *Rochester Railway* [6] deciding that damages could not be recovered for fright or for injuries resulting therefrom laid down a doctrine representative of that followed by the state in all such cases. Although the decision has been challenged [7] it has never been overruled.

In a case [8] recently decided by the Court of Appeals, plaintiff's automobile in which his testatrix was a passenger collided with an automobile operated by the defendant. Damage to the cars was slight and there is nothing in the record to evidence physical injury at the time of the collision. However, plaintiff's testatrix stepped out of the car and while obtaining name and license number fainted; she fell to the sidewalk striking her head, and died within twenty minutes due to a fractured skull. A judgment of $5,000 in favor of the plaintiff was affirmed in the Appellate Division [9] and the following question certified to the Court of Appeals:

"Was it error for the trial court to refuse defendant's request to charge that if the jury finds that the deceased at the time of the collision sustained only *shock* or *fright* without physical injury, they must find for the defendant?"

The judgment was unanimously affirmed by the Court of Appeals and the question certified answered in the negative. Recovery in this case seems to have been based on the principle that there was a physical impact concurrent with the shock or fright, for the court said, "The injury was not confined to fright. The fright was only a link in the chain of causation between collision and fractured

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[4] Spade v. Lynn & Boston Ry. Co., 168 Mass. 285, 47 N. E. 88 (1897); Ewing v. Pittsburgh, etc. Ry. Co., 147 Pa. St. 40, 23 Atl. 340 (1892). (Recovery was denied.) Lindley v. Knowlton, 179 Calif. 298, 176 Pac. 440, *aff'd*, 189 Pac. 798 (1918); Green v. Shoemaker, 111 Md. 69, 73 Atl. 688 (1909). (Recovery was permitted.)

[5] Throckmorton, *Damages for Fright* (1921) 34 HARV. L. REV. 260; Wilson, *The New York Rule as to Nervous Shock* (1926) 11 CORN. L. Q. 512. See also, 11 A. L. R. 1119, 23 A. L. R. 361, 40 A. L. R. 983, 44 A. L. R. 428, 56 A. L. R. 657.

[6] 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604 (1896). Plaintiff while awaiting one of defendant's cars was severely frightened and later suffered a miscarriage, by reason of another of defendant's horse-cars coming so close to her that she stood between the horses' heads when they finally were halted.

[7] Throckmorton, *supra* note 5; see Sider v. Reid Ice Cream Co., 125 Misc. 835, 836, 211 N. Y. Supp. 582, 583 (1925). "There seems to be no reason for the rule announced in the Mitchell case. It is said that the rule was adopted as one of public policy; or as one of necessity to avoid the perpetration of fraud. Whatever may have been the prevailing conditions when this rule was announced, there is now no need of it on the score of public policy or necessity."

[8] Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931).

[9] 232 App. Div. 720, 247 N. Y. Supp. 908 (4th Dept. 1931). Two judges dissented.

skull. *The collision itself,* the consequent jar to the passengers in the car, was a battery and an invasion of their legal right. Their cause of action was complete when they suffered consequent damages."

It appears that the court has taken a progressive step to modify the rule laid down in the *Mitchell* case.[10] There are cases in this state which allow a recovery of damages for fright where it has been proven that there were concurrent physical injuries [11] and in fact there is one case in which damages were recovered although the facts indicate that the injuries were the direct result of fright and not concurrent therewith.[12] However, the instant case seems to stand alone in predicating a recovery on the principle of concurrent physical impact as distinguished from concurrent physical injury.

In *Lehman* v. *Brooklyn City Ry.*[13] where a woman frightened by a runaway horse suffered a miscarriage allegedly due to the fright, recovery was denied on the ground that neither precedent nor authority constituted a basis for the theory of action.

The next case involving this question was the celebrated *Mitchell* v. *Rochester R. R.*[14] decided in 1896. Ten years later in *Newton* v. *N. Y., N. H. and H. R. R. Co.,*[15] the plaintiff, a passengser in defendant's train, although jarred forward in his seat by the force of a collision, was at the time physically uninjured. And because he failed to show any concurrent physical injury he was precluded from recovering damages for the nervous condition which subsequently developed. The facts are peculiarly in point with those of the instant case [16] and if the court had then employed the principle of physical impact rather than that of physical injury, the decision would probably have been in favor of the plaintiff.

In *Hack* v. *Dady* [17] the court ruled that recovery of damages for

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[10] *Supra* note 6.

[11] Jones v. B'klyn Heights Ry. Co., 23 App. Div. 141, 48 N. Y. Supp. 914 (2d Dept. 1897); O'Flaherty v. Nassau Electric Ry. Co., 165 N. Y. 624, 59 N. E. 1128 (1900), *aff'g,* 34 App. Div. 74, 54 N. Y. Supp. 96 (1898); Wood v. N. Y. C. & H. R. R. Co., 179 N. Y. 557, 71 N. E. 1142, *aff'g,* 83 App. Div. 604, 82 N. Y. Supp. 160 (1903); Lofink v. Interborough Rapid Transit Co., 102 App. Div. 275, 92 N. Y. Supp. 386, 16 N. Y. Ann. Cas. 68 (2d Dept. 1905); Mundy v. Levy Bros. Realty Co., 184 App. Div. 467, 170 N. Y. Supp. 994 (2d Dept. 1918); Tracy v. Hotel Wellington Corp., 188 App. Div. 923, 176 N. Y. Supp. 923, *aff'g,* 175 N. Y. Supp. 100 (2d Dept. 1919).

[12] Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N. Y. Supp. 39 (1st Dept. 1914).

[13] 47 Hun 355 (N. Y. 1888).

[14] *Supra* note 6.

[15] 106 App. Div. 415, 94 N. Y. Supp. 825 (1st Dept. 1905). Dissenting opinion by Laughlin, *J.*

[16] *Supra* note 8.

[17] 134 App. Div. 253, 118 N. Y. Supp. 906 (2d Dept. 1909), second trial; 142 App. Div. 510, 127 N. Y. Supp. 22, also 142 App. Div. 948, 127 N. Y. Supp. 26 (2d Dept. 1911). The plaintiff, a mother, sustained slight burns by reason of molten lead cast upon her from the explosion of defendant's lead heater and she alleged that several subsequent miscarriages were due to the fright previously experienced.

fright was not justified unless it could be established that slight physical injuries sustained concurrent with the fright were the ultimate cause of the plaintiff's subsequent physical derangements. Under the doctrine of this case physical injuries concurrent with fright are not always sufficient to warrant a recovery for damages resulting from the fright. The plaintiff was denied a recovery of damages for mental suffering sustained by his wife in the case of *Cook* v. *Village of Mohawk* [18] because the physical ills of the wife, which were aggravated by the mental fear, had not arisen from the same circumstances.

In a comparatively recent case, *O'Brien* v. *Moss*,[19] plaintiff was denied recovery of damages allegedly the result of fright, on the grounds that the record was entirely devoid of proof of any physical injury to which the later sufferings could be traced. Mental suffering occasioned by a delayed telegram announcing a brother's death [20] or because of the tender of an erroneously dated cremation certificate [21] do not afford any basis for the allowance of pecuniary damages. Nor has the doctrine of the *Mitchell* case [22] any application in actions involving wilful tort.[23] However, recovery of damages for fright was allowed in *Jones* v. *B'klyn Heights R. R. Co.*,[24] where the presence of physical injury authorized the jury to find that damages resulted; and fear as a concomitant element did not destroy the right of action but rather enhanced the damages. An electric shock, as in the case of *O'Flaherty* v. *Nassau Electric R. R. Co.*[25] is such an accompanying physical injury as would furnish the basis for a recovery of damages for fright. A profound distinction is to be made between ordinary mental molestation and a severe jolting and jarring associated with physical injury. This was clearly pointed out in

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[18] 207 N. Y. 311, 100 N. E. 815 (1913), *rev'g*, 143 App. Div. 961, 128 N. Y. Supp. 1119 (1911).

[19] 220 App. Div. 464, 221 N. Y. Supp. 621 (4th Dept. 1927). Plaintiff's wife suffered miscarriage allegedly due to fright sustained when defendant's truck negligently backed into the automobile in which she was a passenger.

[20] Curtin v. W. U. Tel. Co., 13 App. Div. 253 (1st Dept. 1897).

[21] Stahl v. Necker, Inc., 184 App. Div. 85, 171 N. Y. Supp. 728 (1st Dept. 1918).

[22] *Supra* note 6.

[23] Preiser v. Weilandt, 48 App. Div. 569, 62 N. Y. Supp. 890 (2d Dept. 1900); Williams v. Underhill, 63 App. Div. 223, 71 N. Y. Supp. 291 (1st Dept. 1901); Beck v. Libraro, 220 App. Div. 547, 221 N. Y. Supp. 737 (2d Dept. 1927).

[24] 23 App. Div. 141, 48 N. Y. Supp. 914 (2d Dept. 1897). A bulb fell from ceiling of one of defendant's cars striking the plaintiff, a passenger, allegedly on the head and abdomen and there was evidence of an immediate injury substantiating her grounds for recovery of damages for a miscarriage due to the blow and the fright.

[25] 165 N. Y. 624, 59 N. E. 1128 (1900), *aff'g*, 34 App. Div. 74, 54 N. Y. Supp. 96 (1898).

Wood v. *N. Y. C. and H. R. R. Co.*,[26] although actual physical impact was lacking in the facts.

In *Lofink* v. *Interborough Rapid Transit Company*[27] evidence and testimony of bodily pain justified a recovery for an abnormal nervous condition produced in the plaintiff as the result of having been thrown to the floor of defendant's train when a collision occurred. It is interesting to compare this case with *Newton* v. *N. Y., N. H. and H. R. R. Co.*[28] and both cases centered upon the question of whether there was physical injury at the time of the accident.

The allowance of a recovery in *Colm* v. *Ansonia Realty Co.*[29] does not follow the principles of preceding cases because the damages were the result of fright unaccompanied by physical injuries. The cases cited[30] therein do not support the statement of the court[31] because in those cases fright was attended by concurrent physical injuries whereas, in the case then at bar, fright preceded the injuries and to argue reversely, if we are to allow damages for the results of fright unaccompanied by physical injuries, then we are in effect granting that an action lies for fright; damages are to depend upon the resulting physical injuries and the logic of the *Mitchell* case would be completely overruled.[32]

In *Mundy* v. *Levy Bros. Realty Co.*[33] the disturbance of the plaintiff's support was a sufficient link in the chain of causation between negligence and injury, to warrant a recovery for the concurrent fright. Minor bruises, in addition to the fright sustained by the plaintiff, substantiated a recovery for both in the case of *Tracy* v. *Hotel Wellington Corp.*[34]

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[26] 179 N. Y. 557, 71 N. E. 1142, *aff'g*, 83 App. Div. 604, 82 N. Y. Supp. 160 (1903). Plaintiff thrown against seat of wagon when train of defendant negligently approached crossing causing plaintiff's horse to run wild. Immediately thereafter plaintiff spat blood and later developed tuberculosis.

[27] 102 App. Div. 275, 92 N. Y. Supp. 386, 16 N. Y. Ann. Cas. 68 (2d Dept. 1905).

[28] *Supra* note 15.

[29] *Supra* note 12. The plaintiff seeing her children descending in an unattended elevator fainted, fell into the elevator shaft and incurred injuries. It was contended that plaintiff was not entitled to damages because her injuries were solely the result of fright.

[30] Jones v. B'klyn Hgts. Ry. Co., *supra* note 24; Wood v. N. Y. C. & H. R. R. Co., *supra* note 26.

[31] 162 App. Div. 791, 792, 793, 148 N. Y. Supp. 39, 40 (1st Dept. 1914). "For fright alone, unconnected with physical injury, it is true that no recovery can be had, but when the fright results in an actual physical injury a different rule prevails," citing cases *supra* note 30.

[32] *Supra* note 6, p. 109. "Assuming that fright cannot form the basis of an action it is obvious that no recovery can be had for injuries resulting therefrom."

[33] 184 App. Div. 467, 170 N. Y. Supp. 994 (2d Dept. 1918). Plaintiff fell to ground when 150-pound elevator door fell near her and she sustained injuries from the fall and from the concurrent fright.

[34] 188 App. Div. 923, 176 N. Y. Supp. 923, *aff'g*, 175 N. Y. Supp. 100 (2d Dept. 1919), Lehman, *J.*, dissented.

The instant case,[35] in promulgating the principle that damages may be recovered for fright and its effects if there is a physical impact concurrent with the fright, has taken a progressive and a logical step in the direction of modifying the doctrine of the *Mitchell* case. The effect of the decision in actions which may arise in the future will always be limited by a determination of whether the injuries are the immediate and evident result of the defendant's lack of care. It would be even a more reasonable and a more just rule if, regardless of physical injuries or physical impact, fright and shock were treated as links in the chain of causation between the wrongful act and the injury.[36]

PHILIP V. MANNING, JR.

LIABILITY OF LANDLORD IN TORT FOR INJURIES SUFFERED ON LEASED PREMISES—PROPOSED STATUTORY CHANGE.

It has been remarked that under present rules of law a tenant has two rights: first, to sign the lease, and second, to pay the rent. This banter is more caustic than witty, and in a sense portrays the notorious situation of unbalance existing in the law of Landlord and Tenant. The heritage of ancient conditions is a law of real property which, in modern urban life, creates situations which are patently unfair to the lessee. Slowly and gradually are the more glaring inequities being eradicated.[1] It is only a matter of seventy years

[35] *Supra* note 8.

[36] *Supra* note 5, Throckmorton, 34 HARV. L. REV., p. 268, "The first reason" (namely, p. 265, that fright caused by negligence is not itself a cause of action none of its consequences can give a cause of action) "assigned for denying recovery for nervous shock resulting from fright may therefore be dismissed with the statement that while it is true no recovery may be had for mere fright for want of a physical injury yet physical injury resulting from a wrongful act is actionable, whether the injury be to the nerves or to some other part of the body and regardless of whether the link in the chain of causation between the wrongful act and the injury to the nerves is physical impact or fright. The essential thing is the existence of the link in the chain of causation, not the character of that link."

[1] In Franklin v. Brown, 118 N. Y. 110, 113, 23 N. E. 126 (1889), Vann, *J.*, speaking for the court said: "It is not open to discussion in this state that a lease, of real property only, contains no implied covenant of this character and that in the absence of an express covenant, unless there has been fraud, deceit or wrong-doing on the part of the landlord, the tenant is without remedy even if the demised premises are unfit for occupation." (Citing Witty v. Matthews, 52 N. Y. 512, and Jaffe v. Harteau, 56 N. Y. 398.) Twenty-four years later, in Streep v. Simpson, 80 Misc. 666, 141 N. Y. Supp. 863 (1913), the court, aware of the pronounced change in living conditions, relaxed the rigor of the above rule and said: *"Conditions unknown to the ancient common law are thus created. This requires elasticity in the application of the principles thereof.* An intolerable condition which the defendant neither causes nor can remedy, seems to me, warrants the application of the doctrine of constructive eviction." (Italics ours.)