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NEGLIGENCE — LIABILITY FOR INJURY RESULTING FROM FRIGHT — While crossing the street in front of her home the daughter of the plaintiff's intestate was killed by the negligent driving of the defendant. The plaintiff's intestate was watching from the window at the time and saw the accident. The shock resulted in illness, which caused her death several weeks later. Plaintiff, as administrator under the Wisconsin Death Act, recovered a judgment for the injury to the mother. *Held*, that the judgment should be reversed since there was no duty to the mother. *Waube v. Warrington*, (Wis. 1935) 258 N. W. 497.

In an able opinion, in which the leading cases and Law Review comments are exhaustively considered, Judge Wickhem recognized that the decision should turn on the question of duty, that is, whether the unreasonable risk of bodily injury to the child of the person suffering injury from shock creates an unreasonable risk of injury to that person.[1] The case is properly distinguished from those in which the plaintiff suffering injury from fright is the person who was threatened with physical danger.[2] In such cases the duty to the plaintiff is clear, and the conflict has been over the questions of policy in allowing recovery for bodily injuries without impact. Wisconsin follows the prevailing view allowing recovery.[3] Situations presenting a question somewhat like that in the principal case are those in which the defendant wilfully assaults some relative of the plaintiff in the plaintiff's presence, or trespasses on the plaintiff's property, causing nervous shock in each case. Under these circumstances a duty to the plaintiff has been found, particularly if the plaintiff's presence was known to the defendant.[4] The

[1] "The problem must be approached at the outset from the viewpoint of the duty of the defendant and the right of plaintiff, and not from the viewpoint of proximate cause. . . . It is not enough to find a breach of duty to the child, follow the consequences of such breach as far as the law of proximate cause will permit them to go, and then sustain a recovery for the mother if a physical injury to her by reason of shock or fright is held not too remote." (Pp. 497-498.)
The court expressly adopts that theory of duty which Mr. Justice Cardozo propounded in Palsgraff v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928). The reasoning of the principal case should be contrasted with that in the similar case, Hambrook v. Stokes, [1925] 1 K. B. 141, where the majority of the court appears to allow recovery on the basis of proximate cause; and with Spearman v. McCrary, (Ala. 1912) 58 So. 927.

[2] Purcell v. St. Paul City R. R., 48 Minn. 134, 50 N. W. 1034 (1892); Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896); Spade v. Lynn & Boston Ry., 168 Mass. 285, 47 N. E. 88 (1897). Talk of causation has figured in this sort of case also. See Throckmorton, "Damages for Fright," 34 HARV. L. REV. 260 (1921), SELECTED ESSAYS ON THE LAW OF TORTS 303 (1924); Bohlen, "Recovery, Negligence Without Impact," 41 AM. L. REG. (N. S.) 141 (1902), STUDIES IN THE LAW OF TORTS 252 (1926); Hallen, "Hill v. Kimball—A Milepost in the Law," 12 TEX. L. REV. 1 (1933); Goodrich, "Emotional Disturbance as Legal Damage," 20 MICH. L. REV. 497 (1922).

[3] Sundquist v. Madison Ry., 197 Wis. 83, 221 N. W. 392 (1928), a case which also presents a nice problem in proximate causation, and strains one's credulity.

[4] Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924); Jeppsen v. Jensen, 47 Utah 536, 155 Pac. 429 (1916); St. Louis, etc., Ry. v. Alexander, 106 Tex. 518, 172 S. W. 709 (1915). Arkansas permits recovery in this case, Rogers v. Williard,

Wisconsin court felt that the plaintiff's injuries were too unusual for them to say that careless driving created an unreasonable risk to her. Moreover, in balancing the social interests involved the court was influenced by the opportunity for fraudulent claims, the increased burden on users of the road as compared with their fault, and the impossibility of limiting the duty to relatives of the person injured.[5] Although the weight to be given to these factors of policy is largely a matter of opinion, the decision is to be commended on the clearness with which the fundamental issue is presented.

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144 Ark. 587, 223 S. W. 15 (1920), but denies it where there is negligence without impact, St. Louis, etc., Ry. v. Bragg, 69 Ark. 402, 64 S. W. 226 (1901). An interesting problem thrown up by the cases in which plaintiff attempts to recover for fright caused by injuries to a third person is the extent to which the duty to the plaintiff should depend on the existence of liability on the defendant to the third person. See Hallen, "Damages for Physical Injuries Resulting from Fright or Shock," 19 VA. L. REV. 253 (1933). Green, "'Fright' Cases," 27 ILL. L. REV. 761 (1933), collects the cases in their functional aspects.

[5] See the dissenting opinion of Sargant, L. J., in Hambrook v. Stokes, [1925] 1 K. B. 141, questioning the possibility of this limitation, adopted by the majority. The American Law Institute RESTATEMENT OF TORTS takes the same position as the Wisconsin court, in sec. 313, adding however a *caveat* regarding the case where a spouse or child is threatened with bodily injury.