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Negligence - Damages - Mental Anguish from Witnessing Peril of Third Party

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NEGLIGENCE—DAMAGES—MENTAL ANGUISH FROM WITNESSING PERIL OF THIRD PARTY—Plaintiffs (husband, wife, and three children) incurred physical injuries and a fourth child was burned to death in an automobile collision with the defendant's vehicle. Plaintiffs claimed compensation for mental anguish sustained from witnessing the death of the child. Defendant's motion to strike the allegations of mental suffering, *held,* granted. Defendant owes no legal duty to protect plaintiffs from mental suffering caused by viewing another in peril. *Lessard v. Tarca,* (Conn. Super. 1957) 133 A. (2d) 625.

It is generally agreed that, with the exceptions of mistreatment of a corpse[1] and delay in transmission of death messages by telegram,[2] there can be no recovery for negligently inflicted mental distress unless it is

1 4 TORTS RESTATEMENT §868 (1939). See also 41 MICH. L. REV. 308 (1942).

2 So Relle v. Western Union Telegraph Co., 55 Tex. 308 (1881). See collection of cases in 7 N.Y. UNIV. L. Q. REV. 772 (1930).

accompanied by a physical injury.[3] If it is sustained contemporaneously with a physical injury, however, all courts allow compensation for mental suffering as an ordinary and proximate consequence of a recognized cause of action.[4] The issue producing difficulty for the courts arises when fright causes physical injury. In this context the physical harm caused by emotional disturbance is necessary to create a legally recognized interest. Here the courts are split on the requirements for recovery. Some espouse the "impact" doctrine which denies compensation unless the plaintiff proves a contemporaneous physical impact, however trivial.[5] The physical invasion merely establishes the cause of action and is irrelevant to the amount of damages sustained.[6] Other courts adopt the non-impact theory which regards the fright as only a link in the chain of causation between the defendant's wrongful act and the consequent physical injury.[7] All courts, however, deny recovery if the plaintiff's physical injury proceeds from fear, not of personal harm to himself, but to the person of another, unless the plaintiff is within the zone of foreseeable physical injury. Otherwise, liability for negligence becomes limitless, according to the leading case of *Waube v. Warrington*.[8] Thus, some courts have held that plaintiff may recover for the effects of fright due to fear for her child where plaintiff

[3] Wyman v. Leavitt, 71 Me. 227 (1880). See cases in 23 A.L.R. 361, 365 (1923), supplemented in 44 A.L.R. 428, 429 (1926); 56 A.L.R. 657 (1928).

[4] 1 TORTS RESTATEMENT §47(2) (1934; Supp. 1948). Connecticut has followed this rule since Seger v. Town of Bakkhamsted, 22 Conn. 290 (1853).

[5] "The point decided in Spade v. Lynn & Boston Railroad, 168 Mass. 285 and White v. Sander, 168 Mass. 296 is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles upon purely practical grounds." Holmes, C. J., in Smith v. Postal Telegraph Cable Co., 174 Mass. 576 at 577-578, 55 N.E. 380 (1899).

[6] "Recovery has been allowed where there has been physical impact, but it has been frankly said that where there has been impact the damages recoverable are not limited to those resulting therefrom. The magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery." Goodrich, "Emotional Disturbance as Legal Damage," 20 MICH. L. REV. 497 at 504 (1922). This article contains an excellent discussion of the physical effects of fright.

[7] Orlo v. Connecticut Co., 128 Conn. 231, 21 A. (2d) 402 (1941). See Throckmorton, "Damages for Fright," 34 HARV. L. REV. 260 (1921), for collection of cases from impact and non-impact states. See also 11 A.L.R. 1119, 1128, 1134 (1921), supplemented in 40 A.L.R. 983, 984, 985 (1926); 76 A.L.R. 681, 682, 684 (1932); 98 A.L.R. 402, 403 (1935).

[8] 216 Wis. 603 at 613, 258 N.W. 497 (1935): "The answer must be reached by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended. It is our conclusion that they can neither justly nor expediently be extended to any recovery for physical injuries sustained by one out of the range of ordinary physical peril as a result of the shock of witnessing another's danger." Some writers have suggested an exception to this rule where a parent's fright and consequent physical injury result from perceiving danger to the child although the parent is outside the area of expectible physical danger. See PROSSER, TORTS 181-182 (1955); HARV. L. RECORD, Feb. 21, 1957, p. 2:2-4; Bohlen, "Fifty Years of Torts," 50 HARV. L. REV. 725 (1937). The *Restatement of Torts* expressed no opinion where a spouse or parent suffers shock and consequent bodily harm from witnessing the peril or harm to the spouse or child, though recovery would be denied to all other persons, 2 TORTS RESTATEMENT §313, *caveat* (1934).

was warding off a chimpanzee attacking the child;[9] where plaintiff was on first floor and a truck crashed into the basement where the children were playing;[10] and where plaintiff was in the house and a runaway truck endangered a child on the porch.[11] The principal case lends itself to this analysis since the plaintiffs were riding in the car which was struck by the defendant and, therefore, were distinctly within the zone of foreseeable danger. Moreover, they received physical injuries from the same act of the defendant which caused the death of the child. The court, however, did not accept this analysis and relied instead upon a recent Connecticut decision[12] in which the plaintiff was not in peril of physical injury so that there was no breach of duty to her. However, the principal case is distinguishable on the facts in that plaintiffs sustained physical injuries from the same negligent act which caused the child's death. Few decisions have involved this situation. The courts are not unanimous, but those denying recovery rely upon decisions in which the plaintiff was not in personal peril.[13] It is submitted that the Connecticut court failed to consider the distinction between proximate cause and duty. If the defendant's negligence resulted in physical injury to the deceased only, fright and physical disturbance suffered by an onlooking plaintiff outside the area of expectible physical danger would not be legally compensable, for there would be no duty owing to him.[14] However, in the principal case there was a violation of a legally protected interest in that each plaintiff sustained physical injuries from the defendant's conduct. The mental suffering, although the result of witnessing the peril of another person, merely became one element of the damages. The right of each plaintiff was independent and was not based on injury to another person. As already shown,[15] emotional distress is compensable when associated with a recognized cause of action. Adopting the view of the principal case creates a paradoxical situation, for while this court denies compensation to a mother for mental anguish caused by witnessing the death of her child, other courts have allowed it to a physically injured, pregnant plaintiff for anguish caused by fears that harm may result to her unborn child.[16] The principal case illustrates that courts should re-examine the

9 Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918).

10 Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933).

11 Frazee v. Western Dairy Products, 182 Wash. 578, 47 P. (2d) 1037 (1935).

12 Fedukowski v. Fedukowski, 18 Conn. Sup. 248 (1953).

13 Alston v. Cooley, 5 La. App. 623 (1927); Sherwood v. Ticheli, 10 La. App. 280, 120 S. 107 (1929). Taylor v. Spokane, Portland & Seattle Railway Co., 72 Wash. 378, 130 P. 506 (1913), and Clough v. Steen, 3 Cal. App. (2d) 392, 39 P. (2d) 889 (1934), are sometimes cited but the language of the courts in both is ambiguous. *Contra,* Humphrey v. Twin State Gas and Electric Co., 100 Vt. 414, 139 A. 440 (1927). Austin v. Mascarin, Ont. R. 165, 2 D.L.R. 316 (1942) allows recovery although the reason is unclear.

14 Waube v. Warrington, note 8 supra.

15 See note 3 supra.

16 Fehely v. Senders, 170 Ore. 457, 135 P. (2d) 283 (1943); Rosen v. Yellow Cab Co., 162 Pa. Super. 58, 56 A. (2d) 398 (1948). *Contra,* Nevala v. Ironwood, 232 Mich. 316, 205 N.W. 93 (1925). See collection of cases in 145 A.L.R. 1092, 1109 (1943).

entire problem, shorn of legalisms, to remove the artificialities and inconsistencies. The courts have started in this direction and probably will so continue.[17] It is therefore unfortunate that the principal case, instead of clarifying issues, constitutes an addition to a legal labyrinth.

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[17] 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906): "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, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law."