Marquette Law Review

Volume 19
Issue 4 *June 1935*

Article 3

Torts: Responsibility for Injuries Resulting from Fear

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NOTES

TORTS—RESPONSIBILITY FOR INJURIES RESULTING FROM FEAR—It is customary to list the elements of every tort as, the existence of a legal duty, a breach of that duty, and damages as the proximate result of that breach.[1] Where no right has been violated, it is said, there is no injury for which the law affords compensation.[2] An act may seem to violate some moral standard and still be "legal." Injuries resulting therefrom are *damnum absque injuria.*[3] To expound the "law" in these words serves rather to obscure the problems which the courts must solve than to give any true picture of the judicial process as it operates within the field of tort.

Legal rights are numerous. All of them are personal in some sense. All persons, as residents of the community, enjoy some degree of protection for their interests in their own personal integrity, their reputations, the relationships between themselves and other classes of persons, between themselves and physical things, chattels and land. Through the judicial process this protection is made concrete in the form of a judgment against some tortfeasor. The protection afforded to individuals through the judicial process for their varied interests is not unlimited. As the New York Court of Appeals has said about the right to protection for one's interest in his own physical integrity, " * * * bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing only that there has been damage done to his person. If the harm is not willful, he must show that the act as to him had possibilities of danger so many and so apparent as to entitle him to be protected against the doing of it, though the harm was unintended."[4]

It is assumed without protest that every person has a right to get protection for his interest in his own bodily security. What factual situation must exist to insure protection for that right against the invasion complained of in the particular case? The answer to that question admittedly involves the application of the doctrine of proximate cause.[5] That problem, the fixing of the limits of responsibility in a typical kind of case, is a function of the court. It is question of law and not a question of fact, to use the popular phrase. The court is affected by the idea of precedent, of course, but the court is free to fix the bounds of responsibility, when the legislature has not literally spoken, as its own ideas of "public policy" dictate.

The present discussion covers the "application" of the "doctrine" of proximate cause in fright cases. An attempt will be made to analyze the cases to show how the courts, in considering the matter of protection for a person's interest in his own bodily security, have been con-

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[1] *City of Mobile* v. *McClure,* 221 Ala. 51, 127 So. 832 (1930).
[2] *McCoy* v. *Board of Directors of Plum Bayou Levee Dist.,* 95 Ark. 345, 129 S.W. 1097, 29 L.R.A. (N.S.) 396 (1910).
[3] *Gebhardt* v. *Holmes,* 149 Wis. 428, 135 N.W. 860 (1912).
[4] *Palsgraf* v. *Long Island R. Co.,* 248 N.Y. 339, 345, 162 N.E. 99, 59 A.L.R. 1253 (1928).
[5] For a brief review of the history of proximate cause in Wisconsin see Note (1934) 18 MARQ. L. REV. 123.

cerned with determining, first, whether "fear," as a condition of mind, is the kind of injury which will raise the question of protection at all, and secondly, whether the bodily condition produced by "fear" in the special case is an injury for which the particular defendant can be held responsible.

Fear, the mental condition, is difficult to evaluate. Where the conduct of the defendant has been inadvertent and not intentional, and where the plaintiff has been frightened as a consequence, the courts hold that there can be no responsibility.[6] It is not the kind of injury against which the plaintiff ought to have protection.[7] The courts are not particularly concerned about the suffering of a plaintiff who has experienced merely an unpleasant sensation. Not only is fear, the mental condition, difficult to evaluate, but its symptoms are difficult to detect. If no limitation is placed upon the scope of the defendant's responsibility any number of persons may pretend to have been frightened by reason of the defendant's conduct.

If the difficulty of evaluation were the only obstacle a plaintiff had to overcome in these cases it would seem plausible that he should recover substantial compensation from a particular defendant where his physical condition is ailing and where the condition has followed definitely as a result of nervous shock produced by the defendant's conduct. In instances of this sort, courts frequently talk as if the plaintiff ought not recover because to recognize such claims would tend to encourage baseless lawsuits and to tax the capacity of juries.[8] These dispositions disclose, consciously or unconsciously, that the courts seem to do what seems best to satisfy the tests of administrative convenience.[9]

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[6] Recovery for fright or fear in the absence of any physical impact and any subsequent injury as a result thereof, has been denied for the reason that the injuries suffered, where the only manifestation was fright, were too subtle and speculative to be capable of measurement by any standard known to the law. *Lehman* v. *Brooklyn City R. Co.*, 47 Hun (N.Y.) 355 (1888); *Ewing* v. *Pittsburgh, etc., R. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L.R.A. 666, 30 Am. St. Rep. 708 (1892); *Mitchell* v. *Rochester R. Co.*, 151 N.Y. 107, 45 N.E. 354, 34 L.R.A. 781, 56 Am. St. Rep. 604 (1896); *Spade* v. *Lynn & Boston R. Co.*, 168 Mass. 285, 47 N.E. 88, 38 L.R.A. 512, 60 Am. St. Rep. 393 (1897).

[7] This seems, however, to be inconsistent with those cases where a plaintiff is suing for damages for personal injuries and where the courts permit the jury in building up the amount of a verdict to put in a sum for mental suffering. See *Morley* v. *Dunbar*, 24 Wis. 183 (1869); *Ulrich* v. *Schwartz*, 199 Wis. 24, 255 N.W. 195 (1929).

[8] *Victoria Railways Commissioners* v. *Coultas*, L.R. 13 A.C. 222 (1888); *Ewing* v. *Pittsburgh, etc., R. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L.R.A. 666, 30 Am. St. Rep. 709 (1892); *Ward* v. *West Jersey, etc., R. Co.*, 65 N. J. L. 383, 47 Atl. 561 (1900); *Houston* v. *Freemanburg*, 212 Pa. 548, 61 Atl. 1022 (1905). The decisions are obviously based upon convenience. The court in *Alabama Fuel & Iron Co.* v. *Baladoni*, 15 Ala. App. 316, 73 So. 205, 207 (1916), sounds a note of caution: "The doctrine of expediency or public policy should be very sparingly and cautiously employed, for if a person's rights have been unlawfully invaded, it would ill become a court of justice to withhold its remedy on the ground of expediency." For a good discussion of the use of public policy in cases of this type see Note (1921) 34 HARV. L. REV. 260.

[9] *Spade* v. *Lynn & Boston R. Co.*, 168 Mass. 285, 288, 47 N.E. 88, 38 L.R.A. 512, 60 Am. St. Rep. 393 (1897), is a typical case in which recovery is denied for injury resulting through fright caused by negligent conduct without physical impact. The court is very clear as to the basis of the decision: "It would seem therefore that the real reason for refusing damages sustained from mere

When the courts suggest that there can be "recovery for fright" when there has been some bodily impact[10] they are willing to overlook some of the practical difficulties about evaluation, and such, in a group of cases which is necessarily but a small sampling of all the "fright" cases. The danger of manufactured actions is not too great when there has been some "impact" because fear or fright will be merely an additional element in the case.

There are some instances, including some Wisconsin cases, where the plaintiff, whose ailing bodily condition has resulted from fear or fright caused by the defendant's conduct, has recovered substantial compensation although there was no "bodily impact."[11] The defendant's conduct in the particular case had subjected the plaintiff's physical self to peril. The probability that numerous persons might claim to have been frightened by reason of the defendant's conduct is limited by reason of the fact that the safety of a few persons only could have been endangered, and by reason of another fact, too, that comparatively few, if any, persons have suffered any physical disability from any fright produced by the defendant's act.

Recently there has been before the Wisconsin court[12] a case concerning the matter of responsibility where the person affected by the defendant's conduct was not personally in peril himself, but suffered the physical disability from nervous shock when he saw a third person's

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fright must be something different; and it probably rests upon the ground that in practice it is impossible satisfactorily to administer any other rule."

In a similar case, the New York Court of Appeals denied recovery saying, "If the right of recovery in this class of cases should once be established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection." *Mitchell* v. *Rochester R. Co.*, 151 N.Y. 107, 110, 45 N.E. 354, 34 L.R.A. 781, 56 Am. St. Rep. 604 (1896). Holmes, C. J., in *Homans* v. *Boston El. R. Co.*, 180 Mass. 456, 457, 62 N.E. 737, 57 L.R.A. 291, 91 Am. St. Rep. 324 (1902), in approving the denial of recovery in this class of cases said, "It is an arbitrary exception based upon a notion of what is practical." The objection of the possibility of fraud as a reason for denying recovery has been characterized as a "pitiful confession of incompetence on the part of courts of justice." Parkhurst, J., in *Simons* v. *Rhode Island Co.*, 28 R.I. 186, 66 Atl. 202 (1907). The weight of objection is questionable when one considers that the function of a jury in every case is to sift the evidence and to determine whether an injury has been proved.

[10] As to what has been held to constitute sufficient impact see *Goldman* v. *Detroit United Rys*, 200 Mich. 543, 166 N.W. 1007 (1918); *Comstock* v. *Wilson*, 257 N.Y. 231, 177 N.E. 431 (1931); *Homans* v. *Boston Elevated Ry. Co.*, 180 Mass. 456, 62 N.E. 737 (1902); *Israel* v. *Ulrich*, 114 Conn. 599, 159 Atl. 634 (1932).

[11] *Alabama Fuel & Iron Co.* v. *Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916); *Lindley* v. *Knowlton*, 179 Cal. 298, 176 Pac. 440 (1918); *Watson* v. *Dilts*, 116 Iowa 249, 89 N.W. 1068, 57 L.R.A. 559, 93 Am. St. Rep. 239 (1902); *Purcell* v. *St. Paul City R. Co.*, 48 Minn. 134, 50 N.W. 1034, 16 L.R.A. 203 (1892); *Pankopf* v. *Hinkley*, 141 Wis. 146, 123 N.W. 625, 24 L.R.A. (N.S.) 1159 (1909); *Sundquist* v. *Madison R. Co.*, 197 Wis. 83, 221 N.W. 392 (1928).

[12] *Waube* v. *Warrington*, (Wis. 1935) 258 N.W. 497 (1935) is a recent case involving precisely this situation. There the deceased was looking out the window of her house watching her child cross the highway and witnessed the negligent killing of the child by the defendant. The deceased, who was in a frail state of health, became extremely hysterical, sick and prostrated through the fright and shock and died as a direct result. The sole question upon demurrer was whether the facts thus alleged in the complaint stated a cause of action in favor of the administrator of the deceased. The court denied recovery on the ground that the defendant owed no duty, under the circumstances, to the deceased, basing its determination upon the ground of public policy.

safety put in peril by reason of the defendant's act. The Wisconsin court, like most courts, whether or not they have pretended to follow the "physical impact rule," refused to permit recovery in this situation. More specifically stated, recovery was denied in one case to a plaintiff who had sustained nervous shock and permanent impairment of health when she saw her daughter dragged along a railway platform,[13] in another case when the plaintiff's fear and physical condition was caused by her concern over the safety of her mother whose life was imperilled by reason of an explosion set off by the defendant,[14] in other cases where the plaintiff's fear was caused by reason of her concern for her husband's safety who was being assaulted by the defendant,[15] and where the plaintiff became ill at seeing a person killed by reason of the defendant's negligence.[16] In each case the court came to the conclusion that the particular defendant owed no duty to the plaintiff.[17] These courts seem not to have been concerned about the place of the accident or the relationship between the person in danger and the person frightened so long as the frightened person was himself in no personal danger. There are other courts which have come to different conclusions, particularly when the third person whose life was endangered bore some close relationship to the ailing and frightened plaintiff, when the place where the defendant performed his act was a private place, like a home, or when the conduct of the defendant was particularly reprehensible.[18]

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[13] *Cleveland, etc., R. Co.* v. *Stewart,* 24 Ind. App. 374, 56 N.E. 917 (1900). And see also *Southern R. Co.* v. *Jackson,* 146 Ga. 243, 91 S.E. 28 (1916), holding the defendant not liable for injury to plaintiff caused by fright at seeing her child mangled.

[14] *Mahoney* v. *Dankwart,* 108 Iowa 321, 79 N.W. 134 (1899).

[15] *Chesapeake & O. Ry. Co.* v. *Robinett,* 151 Ky. 778, 152 S.W. 976, 45 L.R.A. (N.S.) 433, (1913); *McGee* v. *Vanover,* 148 Ky. 737, 147 S.W. 742, Ann. Cas. 1913E, 500 (1912); *Buckman* v. *Great Northern Ry. Co.,* 76 Minn. 373, 79 N.W. 98 (1899). *Contra*: *Lambert* v. *Brewster,* 97 W.Va. 124, 125 S.E. 244 (1924).

[16] *Smith* v. *Johnson & Co.,* an unreported case referred to in *Dulieu* v. *White,* [1901] 2 K.B. 669, 675.

[17] This ground for denial is clearly stated in *Waube* v. *Warrington,* (Wis. 1935) 258 N.W. 497, 500 (1935), where the court says, "It is one thing to say that as to those who are put in peril of physical impact, impact is immaterial if physical injury is caused by shock arising from peril. * * * It is quite another thing to say that those who are out of the field of physical danger through impact shall have a legally protected right to be free from emotional distress occasioned by the peril of others when that distress results in physical impairment. The answer to this question cannot be reached solely by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. 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." The court then goes on to show why it decided that the defendant did not owe the deceased a duty, giving as its reasons, first, that the consequences are too unusual and extraordinary and would be an unreasonable burden upon the users of the highways, and, second, that a contrary determination would open the way to fraudulent claims and would enter a field that has no sensible or just stopping point.

[18] See *Watson* v. *Dill,* 116 Iowa 249, 89 N.W. 1068 (1902), a case where the defendant was a trespasser in the home of the plaintiff. The plaintiff was in fear of the safety of her child, her husband, and herself. Recovery was allowed on the ground that the plaintiff had a right to the peaceful and quiet

It is difficult to suggest any standards which the courts should adhere to in disposing of these cases. Nor can the problems of policy concerned be solved by suggesting that there are two rules, one permitting "recovery for fright" and the other denying that there can be such recovery, and suggesting, too, that each court must line up under one rule or the other. There are any number of different situations in which "fright" may appear, and these different situations require different adjustments. There can be no strict rule nor any liberal rule. No person brought into a case as a defendant ought to be, nor is he, responsible for every consequence which can or does follow as a result of his conduct. Factors such as convenience from the point of view of those concerned about the judicial process, punishment for those persons whose conduct has been selfish, and concern for the person who has been affected by this conduct, are matters which the judges consciously or unconsciously carry in their thoughts when disposing of these or any other tort cases. The bar may not like a particular disposition in a particular kind of case, but temporarily, at least, the bar must accept it for what it is, a choice of policy.

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WORKMEN'S COMPENSATION—OCCURRENCE OF DISABILITY IN OCCUPATIONAL DISEASE.—The increased influx of cases in which the claimant alleges disability due to occupational disease, and particularly to that disease known as silicosis[1], merits a serious consideration of the

enjoyment of her home and an unlawful entry was an invasion of such right. In *Jeppsen* v. *Jensen,* 47 Utah 536, 155 Pac. 429 (1916), recovery was allowed for injuries resulting from fright alone where the fright was caused by the wanton and willful acts of the defendant, though such acts were directed against the plaintiff's husband, and not against the plaintiff personally. Such conduct upon the part of the defendant took place in the home of the plaintiff. In *Alabama* v. *Baladoni,* 15 Ala. App. 316, 73 So. 205 (1916), the defendant shot a dog in the close proximity of the plaintiff's daughter. The plaintiff sustained a fright and physical consequences followed, for which she was allowed to recover. Nowhere throughout the opinion is there an indication that the plaintiff was frightened other than because of her own personal peril. In *Engle* v. *Simmons,* 148 Ala. 92, 41 So. 1023 (1906), defendant's employees entered the home of the plaintiff and rummaged around, without her permission and in her presence. The plaintiff was frightened and sustained physical injuries therefrom. Recovery was allowed upon the theory that the right invaded was that of the peaceful possession of the premises. See also *Hill* v. *Kimball,* 76 Tex. 210, 13 S.W. 59, 7 L.R.A. 619 (1890). In the case of *Hambrook* v. *Stokes Bros.,* [1925] 1 K.B. 141, a case strictly analogous to *Waube* v. *Warrington,* (Wis. 1935) 258 N.W. 497 (1935), a servant of the defendant negligently permitted a truck to coast down a hill. Mrs. Hambrook saw the truck coming around a curve, shortly after she had left her children at a point above the curve. She was not in any personal physical peril. She became fearful for the safety of her children, and upon inquiry was informed that a little girl had been injured. She went to the hospital and found that her daughter had been injured. She sustained a severe shock and consequent physical injury from which she died. The court assuming the existence of a duty, proceeded to view the case from the standpoint of proximate cause and permitted a recovery.

[1] Biennial Rep. Wis. Ind. Comm. (1932-34), 69. The report defines silicosis as "a disease of the respiratory tract caused by inhalation of deleterious dust in certain industries."