

## RIGHT TO RECOVER FOR INJURY RESULTING FROM NEGLIGENCE WITHOUT IMPACT.

Perhaps upon no question presented within recent years has there been so much conflict in the decisions of courts of the highest authority, as upon that of the right to recover for negligence which causes no direct physical impact, but where an appreciable physical injury ensues in consequence of a fright or nervous shock produced thereby. A recovery has been allowed by the Court of King's Bench in England,<sup>1</sup> Exchequer in Ireland,<sup>2</sup> and the Supreme Courts of Texas,<sup>3</sup> Minnesota<sup>4</sup> and South Carolina.<sup>5</sup> A recovery has been denied by the Privy Council, England,<sup>6</sup> and the Supreme Courts of New York,<sup>7</sup> Pennsylvania<sup>8</sup> and Massachusetts.<sup>9</sup>

Much of the difficulty has arisen from considering the right to recover damages for some particular hurt, in an action of negligence as a whole, governed by a uniform rule; and yet the right may depend upon any of these questions:

1. Has the defendant been guilty of any act of negligence toward the plaintiff?
2. Has the plaintiff suffered any legal damage in consequence?
3. If so, can he recover for this specific hurt as an item of compensation?

These three questions are each governed by their individual rules, each by its own considerations of general utility

<sup>1</sup> *Dulieu v. White*, L. R. 1901, 2 K. B. 669.

<sup>2</sup> *Bell v. R. R.*, L. R., 26 Ir. Rep. 428 (1890).

<sup>3</sup> *R. R. Co. v. Hayter*, 93 Texas, 243 (1900).

<sup>4</sup> *Purcell v. R. R.*, 48 Minn. 134 (1892).

<sup>5</sup> *Mack v. R. R.*, 29 So. Rep. 905 (1898), and dictum, 1897, in *Cal. Noun v. R. R.*, 111 Cal. 669 (1888).

<sup>6</sup> *Coultas v. R. R.*, L. R. 13 App. Cas. 222 (1888).

<sup>7</sup> *Mitchell v. R. R.*, 151 N. Y. 107 (1897).

<sup>8</sup> *Ewing v. R. R.*, 147 Pa. 40 (1892).

<sup>9</sup> *Spade v. R. R.*, 168 Mass. 285 (1898), and dictum *Braun v. Craven*, 175 Ill. 403 (1899).

and public policy, and by different rules and conceptions of proximate cause and effect, and of what does and does not constitute recoverable damages.

*First.—The Conception of Legal Injury is Quite Different.*—It will be found that certain forms of very real detriment, such as fright, mental suffering and nervous shock, are not, standing alone, injury sufficient to call for precautions to guard against their infliction, nor do they constitute damage, where damage is the gist of the action, but that they may where other sufficient damage has been shown, and so a right of action established, be allowed as items of compensation. Why is this?

In fact such suffering was never included in the legal conception<sup>10</sup> of injury—a harm done to a right—that conception which the courts applied when the matter came before them for determination. In all such cases<sup>11</sup> it was some material tangible harm which was conceived as legal injury.

Probably many reasons underlay this conception. In the first place mental suffering was comparatively trivial in the great majority of cases, sometimes, perhaps, it was considerable, but the effort of the Common Law has been to lay down rules of general application, and not to provide for every exceptional contingency.<sup>12</sup> There is no legal right to absolute peace and quiet; such an ideal existence cannot be enjoyed amidst a complex civilization. Some rights must be foregone that the business of life may be carried on. So there is no right to freedom from fright, mental suffering,

<sup>10</sup>This is in conformity with what O. W. Holmes, Jr. C. J., so forcibly calls the "Externality of the Common Law," which regards the physical manifestation, not the cause or effect, as the wrongful act or the legal injury.

<sup>11</sup>As in actions on contracts where the measure of damages is for the court as a matter of interpretation of the contract. Here the court specifies the items of compensation, the jury merely valuing them, and deciding other issues of fact incidentally arising; and has never except in a few Western states in the United States, allowed mental suffering, no matter how inherent in the breach, how evidently in contemplation of the parties to be considered as such an item, except in actions of breach of promise of marriage, which are in truth more nearly alike to torts than contract cases.

<sup>12</sup>See *Spade v. R. R.*, 168 Mass. 285 (1898).

or nervous shock, a breach of which is legal injury, an act probably injurious to which is regarded as wrongful. Such injuries must rest where they fall, they are too frequent and too unimportant for the law to interrupt the business of the community and of its courts, to grant the protection either of preliminary precaution to prevent them or of a right of action to recover damages for them if they occur. Equally cogent with this conception when first formulated, though no longer valid,<sup>13</sup> was the practical impossibility of administering any other rule, the parties being incompetent to testify.

The courts were quite ignorant of what took place, they had to be placed in possession of the facts before they could act. In action of tort<sup>14</sup> both the fact of the wrong and the extent of the injury caused thereby was reported to the court by the jury to whose knowledge, as representing the general knowledge of the community the parties had, in theory voluntarily, appealed as decisive.<sup>15</sup>

No fact could be legally important which could not be made by some legal means, to appear to the court for its action. Acts were either notorious,<sup>16</sup> as such a part of the *communsance of the pais*, that general knowledge of one's neighbor's affairs even now common in small communities, or at least capable of perception by the senses and so proper matter for the testimony of a witness competent as having that special knowledge which comes from having personally seen and heard.

Thus, the difficulty of proof<sup>17</sup> was added to the compara-

<sup>13</sup> Since now it is practically universal that the parties are competent witnesses.

<sup>14</sup> Other than certain actions for injury to property, both real and personal, when the courts assumed a more specific control over the jury's action on the question of damage.

<sup>15</sup> Supplemented by the special knowledge of persons who had seen and heard the events, and so were competent to be witnesses as experts as to these facts.

<sup>16</sup> And the tendency of the early law was to require if possible some act striking and open, so as to be easily embodied in the general knowledge of the vicinage as Hue and cry, dower at the church door; livery of seizin, etc.

<sup>17</sup> Expressed in the maxim: "The thoughts of man are not triable." Brian C. J., the jury don't know them, and the only source of information, the man himself, is unavailable.

tive triviality of the harm and as the tendency of the Common Law is to provide for general conditions and not exceptional cases of hardship, the fact that sometimes the injury was in reality considerable<sup>18</sup> did not tend to disturb the strict application of the rule that only tangible material harm was legal injury.

Probably the difficulty<sup>19</sup> of proof standing alone might not have been sufficient to bar recovery had there been a right to peace of mind, regarded as worthy of protection and redress, for the jury is directed to consider such sufferings in computing the damages where a cause of action has been shown, and from the first moment when the court assumed the power to control and direct the jury's action as to damages, they have been required to find upon evidence, not to guess about matters not within their legal knowledge,<sup>20</sup> and were such injuries incapable of legal proof, so much of their verdict as represented such suffering would have been without evidence to support it.

In truth such suffering is either inherent in and a necessary concomitant of the wrong committed<sup>21</sup> or the injury sustained,<sup>22</sup> or the testimony which proves the one or the other does disclose its existence evidenced by some material manifestation.<sup>23</sup> Probably the courts did not disturb the jury's

<sup>18</sup> Such suffering is in a vast majority of cases trivial. In a few instances it may be considerable. Tangible physical injury, while it may be sometimes trivial, is almost always considerable.

<sup>19</sup> The proof was not *one-sided* as is often now said to be a reason for refusing recovery, for the plaintiff could not testify.

<sup>20</sup> The court could of course never revise the jury's findings as to damages or indeed on any matter of fact until they ceased to report the general knowledge of the vicinage and had become a body whose function was to judge the facts presented to their attention by evidence, debarred from proceeding on the private knowledge of its members unless stated in open court.

<sup>21</sup> See Woods' notes to Mayne on Damages, p. 74, generally accepted and cited as a correct statement of the rule (147 Pa. 40), "The mental suffering is such as grows out of the *sense of peril or mental agony* at the time of the *accident*."

<sup>22</sup> "And that which is incident to and blended with the bodily pain incident to the *injury* and the apprehension and anxiety thereby induced."

<sup>23</sup> When, too, the injuries are personal, it follows naturally; when

findings because there was some if not much evidence for their finding, the allowance of such damages being itself an anomaly growing out of the jury's unrestrained and unrestrainable freedom of action in the determination of matters of fact.<sup>24</sup> The jury looked at the real not the legal injury suffered by the plaintiff; the court had no power by which they could enforce on them their own conceptions, and so they always looked at the wrong as a whole, the defendant's conduct and what they thought the plaintiff had suffered; in the rough—what they would take to undergo such treatment,—and on this basis awarded the damages. When the court obtained power to control and direct the action of the jury, the practice had become inveterate for the jury to give damages on this basis to an extent palpably greater than any possible value of the mere legal injury, and instead of reducing such verdicts to the limits of compensation for the exact legal injury, the courts explained them by saying that the jury had considered the misbehavior of the defendant, and the agony and pain of the plaintiff, and approved them, finding that on the whole justice was served by allowing the consideration of such items, and so adopted them into the rules in which they have gradually formulated the measure of damages. The difficulties of proof, while serious enough to influence the court in conjunction with the other reasons to deny redress for such things as are themselves actionable injury are found not serious enough or actual enough to warrant the court in interfering with a long established and generally wholesome practice.

the injury is to property such suffering results naturally only under exceptional circumstances; normally, no such consequences ensue. Nor is such suffering inherent in either the wrong committed or the injury sustained. Nor does the evidence proving the one or the other usually disclose its existence. So in cases of injury to property, it required proof of peculiar circumstances to let in such suffering as an item of damage: *White v. Dresser*, 135 Mass. 150 (1883). Where the circumstances of the wrong were such that such sufferings were natural, damages could be recovered for them: *Fillibrown v. Hoar*, 124 Mass. 580 (1878).

<sup>24</sup> Itself arising from the fact that as anciently the jury proceeded on its own knowledge, and not on evidence, the court not possessing the knowledge could not tell whether the verdict was correct or not. This could only be done by another greater jury, the attain jury.

A failure to realize that the normal conception of recoverable injury is something material and tangible, and that the allowance of compensation for mental sufferings in *tort* cases is an anomaly resulting from the original functions of the jury in such cases, and their absolute liberty in their findings of fact, has led to a number of reasons being given in an effort to explain why such suffering is not sufficient damage to support an action. The principal being:

1. That it is too remote. It is enough to say of this that it is difficult to see why a result which is so remote that a man is not responsible for it if it alone occur, can become a proper subject of compensation by the same person, because he has actually caused some other harm to the plaintiff.

2. That it is against Public Policy. (a) Because to allow it, would be to encourage litigation. But as litigation is merely devised as a means by which an injury done by a wrong to a right may be redressed, it is a contradiction to the letter and spirit of law and justice to refuse redress by litigation if a legal injury is caused to a legal right by an act which is only wrongful because it threatens injury.

(b) Such injury is too delicate a matter for the scales of justice to weigh.

(c) The proof is too one sided. Its nature and extent can only appear from the testimony of the plaintiff practically incapable of corroboration or contradiction. (This reason is at best modern since parties have only recently become competent to testify.)

If these objections mean that the harm is too trivial to be regarded as injury, the right of peace of mind too unimportant, too easy to offend, too difficult to protect, to be regarded as a legal right, and that the difficulty of proof being added as another reason such suffering is not legal injury—they fairly state the law but they are open to the criticism that, as stated, they equally apply to exclude consideration by a jury of such suffering in the assessment of the damages, for if the scales of justice cannot weigh so delicate a matter, surely it is too nice a matter for the far rougher decision of a jury; if it be one sided in proof, easy to fabricate, hard to controvert, surely it is unjust that such evidence should

enlarge the amount levied upon the defendant. And, as will be seen, it has led to the idea that when mental suffering or nervous shock forms a direct link in the chain of cause and effect some reason of public policy forbids recovery though tangible physical damage such as the courts have always considered a legal injury has resulted from the wrong through the medium of such shock or suffering.

Even where there is an intent to frighten as in *Downton v. Wilkinson*,<sup>24a</sup> the act was wrongful not because intended to frighten the plaintiff, and so an injury to her peace of mind, but because it was an act willfully done calculated to cause physical harm to the plaintiff, *i. e.*, to intringe her legal right to personal safety, and was actionable because in fact it caused physical harm to her. It was because of the inherent necessary tendency of such language to cause some physical disturbance that the act was wrongful, and it was no answer to say that the effect was greater than was anticipated. That is commonly the case with all wrongs.

*Second—The Conception of Proximate Cause and Effect Also Varies with the Question Presented.*—The existence of negligence depends upon broad considerations of general utility, of public policy as consisting of convenience of the community as a whole, upon what protection can be given to the person and property of one citizen without unduly hampering the liberty of the others; and so no act is wrongful as being negligent unless it threaten a probable injury to some person or class of persons, an injury to a right sufficiently important to be worth preserving even at the cost of the restricted freedom of the wrong-doer, an injury grave enough to warrant the imposition of precautions to prevent it.

The existence of the wrong of negligence depends not on what has happened, but upon what might reasonably have been foreseen as likely to happen when the act was done. Otherwise every man would act at the peril of having to answer for all the harm he might cause.

No act can be said to be negligent as to the plaintiff, unless the average man if in the defendant's position know-

<sup>24a</sup>L. R. '97, 2 Q. B. 57.

ing what he did or should have known, should have regarded injury to the plaintiff<sup>25</sup> likely to result if care were not taken. This probability of injury raises the duty of care. So, too, the act done (the duty of care being shown to exist), must be a failure to observe that standard of care which the circumstances would lead "the normal citizen" to think necessary to guard against the dangers reasonably to be anticipated as likely to result from his actions. The jury, twelve men drawn at random from the community, and so supposed in the aggregate fairly to represent the viewpoint of the average man, must put itself in the defendant's place at the time he acted and judge of his action by the probable consequences of it. If no harm were then probable the act does not become negligent because injury actually follows, nor will it be the less negligent if injury were threatened because in fact none resulted. No action will lie because wrong and damage must unite, not because the act was not wrongful. Where the liability in a negligence case turns upon the existence of negligence, the rule often announced as applicable generally, that liability is to be limited to the natural and probable consequences of the act done<sup>26</sup> is absolutely correct.

When, however, the act is proved or admitted to be negligence and so wrongful, it remains to establish some legal injury resulting therefrom, as its legal proximate consequence, to make it actionable.<sup>27</sup> Here the act being wrongful, the wrong-doer must answer for all the consequences which flow in an unbroken natural sequence from his act, not merely those he could have foreseen.<sup>28</sup>

<sup>25</sup> Or some class of which plaintiff was one.

<sup>26</sup> Allen, J., *Spade v. R. R.*, 168 Mass. 285; Paxson, Ch. J., *Hoag v. R. R.*, 85 Pa. 293 (1877), and many other cases announcing a similar rule in varying language.

<sup>27</sup> As in almost all actions on the case. The act is wrongful as threatening harm; it is actionable because harm results.

<sup>28</sup> It will be found that even in those jurisdictions where the rule of responsibility is generally broadly stated as for the probable consequences alone, that it is a practice modified, whenever the negligence is proved or admitted to exist, into a rule in effect allowing a recovery for all the natural consequences though unforeseeable. Redress to the person injured for whose protection the act was made wrongful



The jury, for here again they are to judge except in cases admitting of no two opinions, must look not at what the defendant might have expected, but at what has actually taken place, and say whether looking back at the completed whole the injury sustained is the consequence of the wrong assisted by nothing but the usual natural forces, and working out its injurious tendencies in accordance with the recognized and known laws of cause and effect. Of course if a cause unconnected with the wrong intervene, and divert those consequences to some new and different end, then the injury is no longer the result of defendant's wrong, but of the new cause. Natural and not probable consequence is here the legal conception of proximate result.

Negligence and injury being shown and the action thus established, how far is the defendant liable, how is it to be determined, what part of the ensuing harm is to be compensated by him, which conception of proximate cause controls? Exactly the same as in ascertaining the existence of actionable injury—the natural effects until diverted—but the conception is in no wise extended. If a certain injury is not a natural consequence, so as to constitute damage, it is too remote to be considered as an item of compensation.

The court in all actions of tort from the first moment when it assumed any control over and direction of the jury in assessing damages therein, even for intentional wrongs has always excluded evidence of injuries which have not resulted naturally from the defendant's acts, and has always when this may not be possible<sup>29</sup> directed the jury that they must not consider any damage not so resulting, and this in accordance with elemental natural justice. While it is proper that the plaintiff shall recover for all he has suffered from the defendant's acts, there is no reason why he should be remunerated at the defendant's expense for consequences in no wise attributable to the latter. This

is the object, not mercy for the wrongdoer: *Hill v. Winsor*, 118 Mass. 251 (1875); *Oil City v. Robinson*, 99 Pa. 1 (1881); *Hogsett v. Bunting*, 139 Pa. 363 (1890). See AMERICAN LAW REGISTER, February and March, 1901. Proximate Cause in Negligence Cases, Vol. 40, N. S., pp. 79 and 118.

<sup>29</sup> As where it is impossible to dis sever in proof the proximate from the remote.

is no more proper than to give a right of recovery for harm suffered against one whose act has not injured the plaintiff at all.

It is to be remembered in determining the natural effects of a wrong, that the laws of nature and their operation are now infinitely better understood than ever before.

In cases of injury to the person, the connection between the original inciting cause and the final physical deterioration, is now capable of accurate diagnosis and proof by medical testimony,<sup>30</sup> while no such proof in the majority of cases was possible some generations ago.

It must also be noted that even conscious human action<sup>31</sup> is not an independent intervening agent, if the action is in accordance with the recognized customary habits governing human conduct under the circumstances created by the wrongful act, such action is but a natural consequence of the wrong, such habits are part of the known natural forces which assist but do not divert the injurious tendencies of the wrong. Surely if the action, whether of a man, either the plaintiff<sup>32</sup> or a third person,<sup>33</sup> or even an animal<sup>34</sup> is not an intervening agent, the direct action upon the body of the fright or shock caused by the wrong, is if possible even less a break in the chain of natural effect. It is more direct, more natural, more usual, the interposition of a conscious human intelligence is removed and the injury caused by it is by so much a more closely proximate consequence.

From the foregoing it would appear :

1. That no act is negligent unless it appear to threaten a reasonably probable injury.

<sup>30</sup> Palles, C. B., *Bell v. R. R.*, L. R., 26, Ir. R. 428 (1890). "The relation between fright and injury to the nerve and brain structures is a matter which depends entirely upon scientific and medical testimony."

<sup>31</sup> These cases will serve to illustrate this well known principle: *Lane v. Atl. Works*, 111 Mass. 136 (1872); *Jones v. Boyce*, 1 Starkie, 493 (1816).

<sup>32</sup> *Vallo v. Ex. Co.*, 147 Pa. 404; *Twomley v. R. R.*, 69 N. Y. 158 (1877). See cases cited, § 89 Sherman and Redfield on Negligence.

<sup>33</sup> *Vandenberg v. Truax*, 4 Denio, 464 (1847).

<sup>34</sup> *Harris v. Mobbs*, L. R. 3 Ex. Div. 268, 4 Denio, 464 (1847), and the innumerable similar cases where the injury results from an accident caused by fright of a horse induced by defendant's negligence.

2. No negligent act is actionable unless injury result therefrom as a proximate, *i. e.*, natural result.

3. In either case the injury which is threatened or results must be a material, tangible injury.

Mere fright, mental suffering or nervous shock has never been, nor is now regarded by the courts as legal injury.

4. Neither fright nor mental or nervous shock is too remote for recovery. they may be considered by the jury in awarding damages as items for compensation; nor are the consequences of fright, etc., too remote; they, too, may be considered.

5. Fright or nervous shock, not mere continued grief or mental distress, if resulting naturally from defendant's negligence and itself causing action involuntary as being under the compulsion of the fright on the part of some person, either plaintiff himself, or third person, or even an animal, injurious to plaintiff, is not an intervening agent, but a usual natural force, its effect but an operation of recognized laws of cause and effect, in fact it is but a link in the chain of causation between the wrong and the injury.

The only question remaining in doubt is whether an action lies (1) where the act threatens probable ~~material physical~~ injury (as by direct impact), and (2) where physical injury has been in fact suffered, but where there ~~has been no direct~~ impact (this generally due more to good luck than any effort of the defendant to repair his carelessness) and it is shown by competent medical testimony that physical injury results naturally from the fright or shock, itself undoubtedly a natural consequence of the wrong.

Three cases deny recovery for substantially similar reasons: In *Mitchell v. R. R.*,<sup>34a</sup> the defendant's act was undoubtedly negligent, it was by mere good luck that there was no direct impact, the fright was an almost inevitable result of the accident, and from it physical injury, a miscarriage, followed naturally.

In *Victoria R. R. v. Coultas*,<sup>34b</sup> the damage was again a miscarriage resulting from a severe fright due to the gate-

<sup>34a</sup> 151 N. Y. 107 (1896).

<sup>34b</sup> L. R. 13 A. C. 222.

keeper, at a level crossing of the railroad, shutting down the safety gates while the plaintiff, driving in a carriage was within, the gatekeeper having invited her to cross, while a train was approaching, which in fact almost struck her.

In *Ewing v. R. R.*,<sup>34c</sup> the case came up on demurrer to the plaintiff's declaration, which alleged that in consequence of the plaintiff's negligence, a collision occurred upon their line, being immediately adjacent to the plaintiff's residence, in consequence of which, a car fell upon the house in which she was seated, causing her intense fright and nervous shock resulting in permanent physical disability.

In each case the court gives several reasons for its decision, two of them being the same in all three. (1) That the action is brought to recover for the fright, the physical injury being merely matter of aggravation, and so, if recovery be given it must also be allowed when fright alone ensue.

As to this first reason, the court in *Mitchell v. R. R.*, says: "These results (the shock and miscarriage), merely show the severity of the fright and the extent of the damages," and so that the right of action depends on "whether a recovery may be had for fright;" if so, an action lies "no matter how slight the injury," if not there can be no recovery, "no matter how grave the consequences;" and after correctly deciding that mere fright will not be sufficient to support the action, not noticing that this is because no injury which the court considers damage has been shown, they leap to the conclusion that there can be no recovery when physical injury is shown to have resulted, overlooking the fact that thereby a legal injury has been proved, and the only question that remains is, whether it is the legal consequence of the wrong; and that the fright is alleged and proved, solely in order to make out through it, such connection between them.

In *Victoria R. R. v. Coultas*, the court says, that if the plaintiff were allowed to recover, then "not only in a case like the present but in every case where negligence has given a person a serious nervous shock there might be a claim for damages on account of the mental injury." This decision

<sup>34c</sup> 147 Pa. 40 (1892).

proceeded upon the same inability, as that in *Mitchell v. R. R.*, to distinguish between fright, alleged as the injury, the substantive ground of action, and fright alleged and proved merely as a necessary link in the chain of causation, and so to perceive how it is possible to refuse recovery when fright, itself no legal damage, is the only injury proved, and to allow it, where physical injury be shown to result from fright, and so legal damage is established. The same error exists in *Ewing v. R. R.*, where the court says<sup>35</sup>: "The injury proceeds from mental shock alone, there is no allegation that she had received any bodily injury, and if mere fright unaccompanied by bodily injury is a cause of action, the scope of . . . accident cases will be very greatly enlarged. In fact she has alleged in her declaration, and as the case came up on demurrer, her allegations must be taken to be true, that she did in consequence of the fright suffer a permanent physical disablement." The court must mean by bodily injury a direct physical impact.

The court citing Wood's note to Mayne on Damages<sup>36</sup> says that it knows no case where mere fright unaccompanied by bodily injury has been held actionable. Here, however, there is bodily injury which while not contemporaneous with the fright accompanies it in the sense that it is its necessary consequence. There must be physical injury to give a right of action. Mental suffering to be the subject of compensation must be referable to the same wrongful act which causes the injury and so, itself, becomes actionable. This is the sense of legal connection, in which the suffering must accompany the injury. It may and often does follow the physical injury as an after consequence.

The second reason is, that the damage is too remote. The proximate consequences being said to be in *Mitchell v. R. R.* (*Supra*): "all the ordinary results of the act which are usual and, therefore, may be expected; while here, the physical injuries are the result of an unusual combination of circumstances, which could not have been anticipated, and over which defendant had no control and hence too remote."

Laying aside the question of whether under this very

<sup>35</sup> *Per Curiam*, Paxson being, Ch. J.

<sup>36</sup> See notes 21 and 22, p. 144.

definition the injury was not the "usual" and natural result of frightening a woman,<sup>37</sup> and, therefore, to be expected, the definition itself is against the current of authority not merely generally, but more particularly of the New York Court itself. In *Erghott v. Mayor*,<sup>37a</sup> it is expressly held that the liability for admitted or proven negligence is not to be restricted to those results which the defendant might have anticipated as reasonably probable; while in *Tice v. Mumm*,<sup>37b</sup> the plaintiff's pregnancy was held not to be an intervening independent agent breaking the chain of cause and effect between a negligent act, and a miscarriage resulting therefrom.

In *Coultas v. R. R.* it is said: "Such a consequence would not in the ordinary course of things flow from the gate-keeper's negligence,"—that is true, more often the woman would be struck and killed—"and so the damage is too remote." If by this is meant that the precise mode in which injury has resulted was improbable, it is true; but if some injury be probable, it is not necessary that the precise form and manner of its occurrence can be foreseen. It is enough if it happen naturally, assisted by nothing but ordinary natural forces, and who can say that this result is unnatural? What unusual force is there to which the injury can be ascribed as an intervening agent? Such a limitation would bar recovery in innumerable cases, when in England the plaintiff has been allowed to recover.<sup>38</sup>

In *Ewing v. R. R.*, the court relies on the rule originated by Paxson, C. J., in *Hoag v. R. R.*,<sup>38a</sup> defining legally proximate consequences as "those which under the surrounding circumstances might and ought to have been foreseen," a rule often reiterated by him, often applied without qualification

<sup>37</sup> There being always necessarily a certain number of women in every community in the plaintiff's condition.

<sup>37a</sup> 96 N. Y. 264 (1884).

<sup>37b</sup> 94 N. Y. 621 (1883).

<sup>38</sup> *Clark v. Chambers*, L. R. 3 Q. B. D. 365; *Boyce v. Jones*, 1 Starkie 493 (1816), and the many cases where the accident has occurred by the plaintiff's, or some other person's or animal's, action under the influence of the impending danger.

<sup>38a</sup> 85 Pa. 283 (1877).

(and properly) when the question in hand was the negligence of the act, always varied (with equal propriety) in every case where negligence is proved or admitted to exist by holding that the wrongdoer "ought" to foresee all that may occur in the ordinary sequence of natural cause and effect<sup>39</sup> and is thus in effect liable for all the natural results of his act, though in advance improbable.

Even these reasons seem to leave the courts unsatisfied, so in *Mitchell v. R. R.* the additional reason is given that "Public Policy forbade opening a door to actions so easy to fabricate," and where damages are so speculative. They overlook this, that the act done must be one likely to cause actual harm, that the physical injury exists, and is as capable of certain proof as if it followed direct impact, and that at the present time medical testimony can establish the connection between the shock and the injury, with at least as great certainty as it can trace the physical after-effects of a direct physical impact. That the damages would be speculative if the fright or mental suffering were the only injury alleged, will of course be admitted, but here there is actual injury which is capable of accurate valuation with equal certainty whatever the manner, in which it was caused. In fact the error of considering the action as brought to recover for the fright as an injury, and not for the physical injuries themselves as the ground of action permeates the entire decision.

That there is no duty upon defendant to protect plaintiff from fright is advanced in *Erwing v. R. R.* as an additional reason. The court even went so far as to say that "the defendant (a railway corporation) only owes her the duty not to do that which in an individual would amount to an assault<sup>39a</sup> on her person." This is so novel a doctrine as to corporate liability for negligence that serious criticism may be postponed till it rests on some better authority than a *per curiam* opinion, even of a court of last resort.

<sup>39</sup> *Oil City v. Robinson*, 99 Pa. 1 (1881); *Haverly v. R. R.*, 135 Pa. 50 (1890); *Hogsett v. Bunting*, 139 Pa. 363 (1890). See also AMERICAN LAW REGISTER, March, 1901, Vol. 40, N. S., p. 118.

<sup>39a</sup> The court must have meant battery. The gist of assault is subjecting the plaintiff to a reasonable fear of violence and if the word were intentionally used, would lay down a measure of liability far in excess of anything claimed by the plaintiff.

“Nor,” the court then says, “had it (the defendant) any reason to anticipate that the result of a collision on its road would so operate in the mind of a person *who witnessed it*, but who sustained no bodily injury thereby, as to produce such nervous excitement or distress as to result in permanent injury, and if the injury could not have been so foreseen it was not proximate.”

The crucial error in the court’s reasoning is a misconception, leading to an entire misstatement of the facts.

The shock which caused the injuries came not from the distress and fright incident to witnessing the collision, but was the result of the fall of wreckage, in this case a car, upon the house, probably a flimsy shanty, in which she sat; she probably never knew what caused the concussion which shocked her until later. It is undoubted that the company owes no duty to bystanders to run their trains so as not to wound their feelings by causing them to witness a collision, but that it owes no duty to a person living in a house or shanty immediately adjoining its tracks to avoid oversetting their cars upon such house is quite a different proposition—It was mere chance that she was injured through the action of nervous shock and not by direct impact and it is inconceivable that such a claim would have been advanced had the plaintiff been actually struck by the car, and yet in each case the duty and the breach of it would have been the same.

Were the facts as stated there was no negligence because no duty to take care to avoid frightening the plaintiff, so of course no matter what the results might be, the defendant being guilty of no wrong could not be held liable, as in the case of *Fox v. Borkey*,<sup>39b</sup> cited in the opinion where the act, blasting some distance from plaintiff’s property, had no tendency to cause the plaintiff any inconvenience other than fright and so it was properly held there was no right to recover even though through fright a serious physical injury had resulted.

A case very similar to *Fox, v. Borkey* is *Braun v. Craven*,<sup>40</sup> in which the alleged negligence was that the defendant

<sup>39b</sup> 126 Pa. 164 (1889).

<sup>40</sup> 175 Ill. 410 (1898).



entered a room with rubber overshoes on, the plaintiff's back being turned, and spoke sharply and angrily, and thereby frightened the plaintiff in consequence of which she became ill. The court disposes of the whole case in one sentence of a twenty-page opinion: "It could not have been reasonably anticipated that any injury therefrom could reasonably have resulted;" in a word, the defendant's conduct was not negligent. Unfortunately the court, not content with this, stated the following: "Terror and fright even if it results in nervous shock which constitutes a physical injury does not create a liability" mere dictum and true if it mean that no act is wrongful if only likely to cause fright; but quite erroneous if it is construed to mean that one guilty of an act likely to cause actual injury may escape liability for physical injury caused thereby, because the effect of fright on the physical system is one of the intermediate causes.

So in *Spade v. R. R.* the facts were such as to present the question of the existence of negligence. The plaintiff, a female passenger, was startled and disgusted, and as she claimed in consequence rendered seriously and permanently ill by a very slight contact with a drunken fellow passenger, whom the conductor was endeavoring to eject. The only proof of negligence in such ejection was the fact that the drunken man touched her. Was it negligence not to have taken care to prevent such a contact? That was the vital question really involved. It was if the conductor was "bound to anticipate and guard against" any probable injury as likely to attend such contact. Was any injury probable? Fright was undoubtedly probable, but could the conductor anticipate any serious after-consequences thereof? They have actually occurred, but the question is should they have been anticipated and guarded against? The court argues at length that "the general conduct of business, and the ordinary affairs of life must be done on the assumption that persons to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength." "One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule further imposes an undue measure of responsibility upon those guilty only of unintentional (?) negligence."

"The rule, therefore, is just which limits responsibility in such cases to the natural and probable consequences of the act," citing many cases.<sup>41</sup>

"*Hill v. Winsor*, 118 Mass. 251 (1875), and *Lynn Gas Co. v. Ins. Co.*, 158 Mass. 570 (1893), directly contra. Not one of the cases cited necessarily decides that there is any principle of law restricting liability for the consequences of an admittedly negligent act to the results reasonably probable when the act was done.

In *White v. Dresser*, 135 Mass. 150 (1883), the wrong was removal of lateral support; held that "nothing in the nature of the injury to the plaintiff's property involved injury to his feelings," nor did the circumstances attending it give him right to damages therefor (as in the nature of punitive damages though not *co nomine*).

In *Fillibrown v. Hoar*, 124 Mass. 580 (1878), it was held that a wrongful eviction did involve "injury to his feelings by reason of the indignity and insult of being turned out of his home with his family, but not injuries to his health from a journey to his father's house two days later, nor from grief at his family's illness."

In *Lombard v. Lennox*, 155 Mass. 70 (1891), it was held that mental suffering was an ordinary and natural result of a slander and was an item for compensation.

In *Derry v. Flitner*, 118 Mass. 131 (1875), the wrong complained of was a bare infringement of an exclusive franchise, no injury was threatened save by the intervention of such a storm as did assist in causing the loss of plaintiff's vessel. Therefore no injury was probable unless the storm was to be expected, and the only wrong would have been to the plaintiff's property in his franchise. Also here, the storm, if of a sort not to be expected in that climate, would have been an "act of God," breaking chain of *natural* sequence.

In *Notting Hill*, L. R., 9 Probate Div. 105 (1884), the question was whether the negligent ship was liable to the owner of a cargo for loss of a market by delay owing to collision. This case was decided on the authority of *The Parana*, L. R., 2 P. D. 118 (1877). A case of contract (Brett, M. R., saying there was no difference in the measure of damages in tort and contract) which went upon the difference between goods carried by land and sea; the one being designed for immediate sale, and so the loss of the market being a natural loss capable of being proved with reasonable certainty, the other being liable either to be sold while on ship or perhaps not for months after landing, the loss of market being thus, on account of the character of the thing and voyage, mere matter of speculation and conjecture depending not on the delay, but on the owner's choice of action as to the sale of his goods. It would seem that where goods are accepted under a contract to be carried, the character of the goods or purposes for which designed, so far as it may affect the quantum of loss, is fixed by the terms of contract; the extent of the duty of safe carriage is settled by reasons of public policy in the absence of

The court admits that the injury in question may be proximate, and so holding, they are forced to look to some other reason save remoteness. They rely, therefore, on public policy, the inconvenience of administering a rule granting recovery. It is the proximate result of the act, but as their argument clearly shows the act was not negligent because no reasonable man could have anticipated any result but perhaps fright, and fright while it may as they say often be a *real*, not a fanciful injury, is never a legal<sup>42</sup> injury. So in truth the conductor was not "*merely*" negligent, he was not negligent at all unless some legal injury was "obviously probable"<sup>43</sup> to the normal man as the result of his act.<sup>44</sup>

To require more would be to impose a duty of observing

contractual restriction and is primarily a common law liability redressable by an action of tort; the carrier being liable to answer for all damage resulting naturally (though at the time of the wrongful act such result could not be foreseen) to goods of such character, or designed for such uses as is ascertained by the circumstances surrounding the contract for carriage.

<sup>42</sup> For the reason given (p. 144) while it may be real, it is generally in a vast majority of cases fanciful, and so is unimportant in the eye of the law which regards the general condition and not the exceptional case.

<sup>43</sup> In *Hill v. Winsor*, 118 Mass. 256, the test is said to be: "If injury in some form was obviously probable to plaintiff the defendant's act was negligent. It is not necessary that injury in the precise form in which it resulted should have been foreseen, it is enough if it now appear natural and probable"; see remarks on this statement, Vol. 40, N. S., AMERICAN LAW REGISTER, p. 85.

"The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent cause, is the direct and proximate cause referred to in those cases," i. e., of liability for negligent acts.

Knowlton, J., *Lynn Gas Co. v. Ins. Co.*, 158 Mass. 570, at p. 574.

<sup>44</sup> Upon the retrial of the case, 172 Mass. 499, Holmes, C. J., intimated the opinion that such inconveniences were the ordinary expectable incidents of travel, the risk of which every passenger must be taken to have assumed. "To keep the car free from obnoxious persons is the defendant's right and its duty to the plaintiff and the other passengers." Carriers of passengers owe the same degree of care (in the performance of such duty) as in respect to construction and management of their vehicles, but if that care be shown, any injury is probably inevitable accident. As to whether there was negligence in the manner of expelling the drunken man . . . it has not been pointed out to us," p. 490.

a measure of care practically equivalent to that of answering for all the results which may happen to flow from one's acts though in advance no harm could have been anticipated, in a word for every one to act at his peril. Admittedly an impossible standard for human action.

If he had been negligent,—and all negligence is by the very terms of its definition “unintentional” and “mere,”—he has been guilty of an act wrongful because likely to cause injury, and he cannot escape liability because he could not foresee the precise extent of it or the precise mode in which it would occur.

The language used is appropriate to the question presented. Public policy and convenience forbid the imposition of a duty to avoid acts likely to cause fright alone, but all the considerations of public policy are satisfied by requiring no precautions greater than those reasonably necessary to prevent material injury under normal conditions, they cannot require that when the act is negligent because it threatens actual injury, that actual injury sustained in one particular way shall not be redressed while that suffered in every other manner, no more proximately connected with the act or naturally flowing from it, must be compensated.

The court excepts “cases where an intent to cause mental distress is shown or is reasonably to be inferred, as for example in cases of seduction, slander, malicious prosecution or arrest and some others. Nor do we include cases done with gross carelessness or recklessness, showing utter indifference to such consequences when they must have been in the actor's mind.”

If this means that in such case mental suffering alone will support an action it is quite inaccurate;<sup>45</sup> if it means it is

<sup>45</sup> In slander when special damage must be shown, such suffering is not sufficient; as in all other cases of tort, the distress *naturally* produced by the wrong may be considered as an item in computing the amount of compensation to be awarded. So in seduction, that a cause of action may be proved, no matter how aggravated the case, the father must show material damage by showing a loss of his daughter's services, the daughter must be incapacitated from rendering service either by pregnancy or some illness directly caused by the act of seduction, and the girl must be in the father's service, both at the time of the wrong,

allowed to be considered by the jury as an item of compensation when other damage is shown, it stands on exactly the same footing as such suffering accompanying any physical injury caused by negligent or intentional wrong. Probably the court has in mind the rule peculiar to Massachusetts, that while the defendant's actual wicked intent to injure can not be directly punished by the imposition of punitive damages *eo nomine*, a practically identical recovery is given as compensation for the sense of outrage caused to the plaintiff by such intent to injure. The same thought probably led to the exception of cases of gross negligence or recklessness, but surely the court cannot mean to intimate that the grossness or recklessness of the negligence can do away with the necessity of proving a resulting injury; to so hold would be to give a right of action to punish moral wrong not to compensate for legal injury, be the damage called what the court may please, punitive or compensatory for the outrage to plaintiff's feeling. In tort, a malicious intention cannot make an act wrongful which inflicts no injury to a legal right.<sup>46</sup> The only case<sup>47</sup> which deals with fright intentionally inflicted is rested squarely on the ground that the fright to which the defendant intentionally subjected the plaintiff, was one so serious as to obviously threaten actual physical injury, and that it *thus* became a wrong to her right to personal safety, and where physical injury did result, was actionable. If by gross negligence is meant an act which threatened actual injury, and not fright merely, then the decision would fall in line with *Phillimore, J.'s*<sup>48</sup> statement in *Dulieu v. White*, that the question is not one of remoteness, but the existence of a duty.

The cases allowing recovery proceed on the broad principle

the seduction, the injury and the consequent illness—then, and only then, can his distress and shame be a subject for compensation.

In malicious prosecution and arrest an absolute right is invaded; no damage other than the infringement of the right need be shown. Therefore, where such infringement is shown, the damages are at once at large for the jury and include all the inherent distress caused.

<sup>46</sup> *Allen v. Flood*, L. R. 1898, 1 A. C., 1.

<sup>47</sup> *Downton v. Wilkinson*, L. R., 1897, 2 Q. B. 57.

<sup>48</sup> L. R. 2 Q. B., 1901, 684.

that an action lies to recover for legal *i. e.* material injury resulting proximately from a willful or negligent wrong.

In *Hayter v. R. R.*,<sup>48a</sup> there was a collision negligent as to all passengers, but the plaintiff was not thrown from his seat, nor was the grasp of his hands thereon loosened, the only direct result to him of the tremendous shaking up which he received was a violent nervous shock, which resulted in paralysis. It was held that the paralysis was the proximate result<sup>49</sup> of the negligent act and so actionable, rejecting the argument that recovery in such case is against public policy.

In *Mack v. R. R.*,<sup>49a</sup> the S. C. of South Carolina allowed a recovery for physical injury, when the only direct consequence was fright on the ground that the act was wrongful, and the injury proximate, in that it flowed naturally from the wrong, without the intervention of any new independent cause, citing all the previous decisions.

In *Sloane v. R. R.*<sup>49b</sup> the court intimated its opinion, merely dictum, as there was an undoubted injury apart from any mental suffering or physical effect thereof, and they were only proved as aggravation—items of damage to increase the amount of compensation—that physical injury sustained through the medium of fright or mental or nervous shock is actionable damage; saying: “a nervous shock is distinct from mental anguish and falls within the physiological rather than the psychological branch of the human organism.” This is much the same thought as that of Palles, C. B., in *Bell v. R. R.*<sup>49c</sup> “Such a result,” sudden

<sup>48a</sup> 93 Tex. 239 (1900).

<sup>49</sup> Such as “ought, in the light of the attending circumstances, to have been foreseen as a natural and probable consequence.” Compare rule in *Hoag v. R. R.*, quoted in *Ewing v. R. R.*, *supra*. But the court then says: “In the light of common knowledge can a court say as matter of law that strong mental emotion may not produce in the subject bodily or mental injury?” In fact the legal probabilities are not what an average man would foresee, but what an ideal person with his mind directed to all the effects which in the course of nature might result, *ought* to foresee; in a word the test, the limit of liability, are the natural not the probable consequences.

<sup>49a</sup> 29 S. E. R. 905 (1898).

<sup>49b</sup> 111 Cal. 669 (1896).

<sup>49c</sup> 26 Ir. Rep. 213 (1890).

physical change from fright, "must be regarded as an injury to the body rather than the mind." This dictum is instructive and has much of truth in it, but it is unnecessary that nervous shock be considered a direct physical injury for as Palles, C. B. points out, if an injury is proximate, where it occurs at once, it cannot be too remote in the absence of any adequate intervening cause, if the same injury results after an appreciable lapse of time (in the Bell case two weeks and more), from the same wrong. As well might it be said there would be no murder by poison if the victim did not die at once.

In *Dulieu v. White & Sons*,<sup>49d</sup> the plaintiff's declaration set forth that she was sitting in the bar of her husband's public house, when the defendant's servant negligently drove a two-horse van into the room where she sat and "in consequence she sustained a severe shock and was and is seriously ill and gave premature birth to a child." The case came up on the defence that the statement disclosed no cause of action, the damages being too remote. This is the modern substitute under the Practice Act for demurrer.

Kennedy, J., in an elaborate opinion holds that the plaintiff can recover.

In negligence the plaintiff has to prove resulting damage and "a natural and continuous sequence connecting the breach of duty with the damage as cause and effect."<sup>49e</sup>

As to the existence of the duty there is no question. "The driver of a van on the highway owes a duty to use reasonable care so as not to injure persons lawfully using the highway, property adjoining it, or person like the plaintiff lawfully occupying such property." In considering the question "since it comes up on demurrer<sup>50</sup> we must take it as proved that the negligent driving reasonably and naturally caused a nervous<sup>51</sup> or mental shock and that the premature child-birth was the natural result thereof."

<sup>49d</sup> L. R. 1901, 2 K. B. 669.

<sup>49e</sup> *Shearman & Redfield*, cited in *Bevan Negligence in Law*, 2d Ed. p. 7.

<sup>50</sup> As in *Ewing v. R. R.*, 147 Pa. 40, but how different the attitude of that court.

<sup>51</sup> "Nervous" is probably the more correct epithet where terror operates on the physical organism to produce bodily injury.

"It is argued that fright caused by negligence is not in itself a cause of action. *Mitchell v. R. R.*"

"If negligence has caused me neither injury to my property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential ingredient of a right of action in negligence is lacking. Fear, as Sir F. Pollock says, taken alone falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects."<sup>52</sup>

"Direct bodily impact, it may be truly said, without resulting damage is as insufficient a ground of legal claim as fright. That fright cannot be a ground of action in absence of accompanying impact is both unreasonable and contrary to authority. Leaving out *Downton v. Wilkinson*, a case of willful wrong, and the criminal cases cited by Beven, p. 81-2, *Jones v. Boyce*,<sup>52a</sup> *Harris v. Mobbs*,<sup>52b</sup> and *Wilkins v. Day*,<sup>52c</sup> go far to negative such claim. In the first, the fright to the passenger, in the others to the horses, ought to be regarded as the direct and immediate cause of the damage."

Perhaps it is hyper-criticism to suggest that after all in neither of these cases nor in that in hand is the *fright* the ground of action. The physical injury is the damage alleged, and the fright in all the cases is "but a link in the chain of causation."<sup>53</sup>

"The results here being physical are as measurable in damages as the same results would be if they arose from actual impact."<sup>54</sup> "There is one limitation . . . the shock must arise from a reasonable fear of immediate personal injury to oneself." "There is no legal duty not to shock B.'s nerves by the exhibition of negligence toward C. or the

<sup>52</sup> Here is an allusion to one of the reasons why such harm is not legal injury, the difficulty of legal proof. See *ante*, p. 143.

<sup>52a</sup> 1 Starkie, 493 (1816).

<sup>52b</sup> L. R. 3 Ex. D. 268 (1878).

<sup>52c</sup> 12 Q. B. D. 110-90 (1883).

<sup>53</sup> Phillimore, p. 684.

<sup>54</sup> See *Mitchell v. R. R.*, *supra*, p. 155, where difficulty of assessing damages is stated as a reason for refusing recovery.



property of B. or C.," citing *Smith v. Johnson*,<sup>55</sup> where a man was made ill by seeing another negligently killed. "As the defendant neither intended to affect the plaintiff injuriously nor did anything which could reasonably or naturally be expected (to do so), there was no evidence of the breach of any legal duty toward the plaintiff," in a word, as to the plaintiff, defendant was not negligent.<sup>56</sup> In fine, the injury must be the natural result of an act negligent to plaintiff, as "causing him reasonable fear of personal injury." An act negligent because threatening him with actual and so legal injury. There is no negligence if actual injury be not threatened; there is no duty to avoid acts likely to cause fright only.

So there being negligence, if actual injury ensue not remotely but proximately there is a right to recover.

"Is there any reason why physical injury which follows naturally nervous shock is less proximate in a legal sense than that which arises contemporaneously?"<sup>57</sup>

"As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the death is not contemporaneous with its administration.<sup>58</sup> Remoteness means, not severance in point of time, but the absence of direct and natural causal sequence, of a natural or necessary descent from the wrong to the damage."

The injury to health which forms the main ground for damages in actions of negligence is frequently proved as a sequel not concomitant of the occurrence.

"As to the claim in *Victoria R. R. v. Coultas*, that if an action lay there it would in every case of mere serious nervous fright," he says, "but *actual physical injury* was there

<sup>55</sup> Unreported, a case similar to *Spade v. R. R.*, the facts supposed by the court to exist in *Ewing v. R. R.*

<sup>56</sup> As in *Braun v. Craven*, *Fox v. Borkey*, and *Spade v. R. R.*

<sup>57</sup> "I should not like to assume that it is scientifically true that nervous shock which causes serious bodily injury is not actually accompanied by physical injury, though impossible to detect in living subject." See similar statement, *Sloane v. R. R.*, 111 Cal. 667.

<sup>58</sup> *Palles, C. B.*, 26 L. R. Ir. 439.

established by jury's verdict, which if unsupported by the evidence should have been set aside on motion for new trial."

As to *Mitchell v. R. R.*, that it was error to say as matter of law that the injuries plainly result from an unusual and accidental combination of circumstances. This is for the jury; if such injuries are not proximate, how are those in *Jones v. Boyce*?<sup>59</sup> True, Mrs. Mitchell was pregnant, and her injuries were thus increased; but it is no answer to say that a man run over by negligence, would have suffered less, had he not had an unusually thin skull or weak heart."

Suppose in the *Mitchell* case, the plaintiff had been struck, would the court have refused her compensation for her miscarriage? If not, they must consider the damage not too remote. As to *Spade v. R. R.*, he says: "If it is admitted that such damage is not too remote in principle to be recoverable at law, I should be sorry to bar all such claims on ground of policy alone to prevent the possible success of groundless actions. Such a course involves a denial of redress in meritorious cases and shows a certain degree of distrust which I do not share in the capacity of legal tribunals to get at the truth in this class of cases."

Phillimore, J. reached the same conclusion though by a different process of reasoning. He says: "There may be a duty owed by A. to B., not to inflict a mental shock on him," citing cases of *Jones v. Boyce* and *Downton v. Wilkinson*. "To give cause of action the act which terrifies must be either willful or negligent."

As between people traveling on the highway, "it is not certain that there is any duty to conduct oneself, *so as not to* frighten others, only so as not to cause collision or some other form of direct personal injury."

He also says: "There are dangers to the crossing the Strand at Charing Cross that might frighten the coolest man, but if physical injury followed such fright, it may be there is no cause of action." It may be a person venturing on

<sup>59</sup> In *Twombly v. R. R.*, 69 N. Y. 158, the same principle is carried still further; plaintiff, a passenger, reasonably fearing a collision, jumped out and was injured. The collision being avoided, he alone was hurt. He recovered damages for his injury.

the streets takes his chance of terrors,<sup>60</sup> but here the plaintiff was in her husband's house where she had a right, in fact was under a duty to be, and where she had the right to personal safety.<sup>61</sup>

So as to *Victoria Co. v. Coultas* and *Mitchell v. R. R.*, he says: The defendant's servants were careless, and they would have been liable had actual impact occurred,<sup>62</sup> even in consequence of a wrong manoeuvre induced by fright, "but it may be that they are not liable if impact be escaped however narrowly."

In *Spade v. R. R.* the plaintiff being a passenger, "the company owed her no duty to take care not to frighten her, she having assumed such risk; *aliter* in the case of the occupier of adjacent premises."

Finally he says: "The difficulty in my mind is not as to the remoteness of damage but the uncertainty of there being any duty. Once get the duty and physical damage following the breach of duty, the fact of one link in the chain of causation being mental only makes no difference." If to this be added that part of Mr. Justice Kennedy's opinion dealing with the existence and extent of the duty, the result would be a statement of a rule safe, just, practical and accurate.

Unfortunately Phillimore, J., seems to conceive that the duty must be to avoid acts likely to cause fright, and that the negligence of an act is to be determined not by the inherent tendency to cause harm but by its natural consequences.

*Downton v. Wilkinson* did not decide that there was any right to personal safety, in the sense of safety from personal distress, fright or inconvenience or injury of any sort other than that which is tangible, material, bodily.

The defendant intended to create a fright so severe as to be obviously calculated to cause serious physical results.

<sup>60</sup> See *Spade v. R. R.*, 172 Mass. 488, where same thought is more accurately expressed by Holmes, C. J.

<sup>61</sup> In the sense in which he understood Wright, J., in *Downton v. Wilkinson*.

<sup>62</sup> In *Victoria v. Coultas* the court expressly refused to express an opinion as to whether actual impact was necessary.

The act was wrongful, not as Phillimore says, because the defendant had destroyed the plaintiff's personal safety and thereby caused physical injury to her, but the act was wrongful because intentionally an act was done *likely* to cause her physical injury, *and so* affect her right to personal safety.

There is no duty to avoid acts likely only to cause ordinary fright to the public generally, because the effect of fright on the average person is trivial, and serious results cannot be anticipated, but to do an act intended<sup>63</sup> to cause fright of a peculiarly severe nature, or to a particular sensitive class is wrongful because, and only because one who does so might and must realize that such a fright, or any fright to such persons will probably cause actual bodily harm.

In *Jones v. Boyce* the act was wrongful, not because it *did* frighten the plaintiff and so infringe his right to "personal safety," and cause him to act to his physical hurt, but because when it was done, it had a probable tendency to cause him physical injury in some way; had no injury resulted it would not have ceased to be negligence; injury is not necessary to make an act wrongful, it is, however, of course necessary to make the wrong actionable.

In negligence, the duty is not to prevent certain results but not to act in a way likely to cause certain results. Not to insure against certain injuries, but to take precautions to prevent such injuries. The negligence of an act depends upon whether the normal man would foresee that from it, injury would probably result to some person or class of persons. Phillimore, J., in his criticism of *Victoria v. Coultas*, seems to think that the legal quality of a careless act is held in suspense, after the actor has lost all control over the event, to await the consequence; if a certain species of damage occur the act is wrongful, if another, it is perfectly proper. In truth the negligence of the act depends on its tendency to

<sup>63</sup> Or probably one necessarily causing such fright, though with the limitation that great public businesses cannot be carried on with respect to the safety of exceptionally sensitive persons. The necessities of the prompt transaction of business outweighs the safety of a class so small in numbers. See *Spade v. R. R.*, 172 Mass. 288.

do actual harm in some manner, not any particular species of harm in any particular manner. The defendant's guilt depends on his action not on its results. That only affects the plaintiff's right to recover from him, if as a legal consequence a legal right of his is injured. That none results is like the plea *not possessed* in trespass, or of *truth* in libel; the act remains wrongful, but the plaintiff has shown no right to the thing injured by the wrong.

As to the case of a person crossing the Strand at Charing Cross, the right of action depends on the character of the act, whether negligent or not, which occasioned the terror, not on the fact that terror is the only direct consequence. It is erroneous to say that a person on the highway takes all the risk of the traffic; he does take the risks of traffic conducted with normal regard for his physical safety;<sup>64</sup> this includes the risk of either collision or terror so caused, but he does not assume the risk of any negligent act on the part of those engaged in the traffic.

Traffic is conducted with due care, if all precautions are taken ordinarily sufficient to prevent personal contact. No precaution need be taken in addition thereto merely to avoid causing fright. Nor is it accurate to say that those traveling the highway owe the occupants of adjacent property any higher duty than they owe to fellow-travelers; both are entitled to such care as will protect them from bodily harm, and no more; such occupant has no more right than a traveler to ask for immunity from mental distress consequent on the normal conduct of the customary traffic. He must put up with all the inconveniences resulting from the location of his property.

The case of *Spade v. R. R.* is misunderstood. The principle is stated quite generally; there is nothing in the opinion to limit it to passengers, or to indicate that carriers owe to them any lesser duty than to occupier of adjacent premises. Both expediency and the decided cases would indicate that the carrier's duty of care to its passengers is of the highest degree, falling but little short of that of insurers of safety;

<sup>64</sup> See Pollock on Torts. Webb's ed., p. 198, under head "Taking risk."

it may probably be safely said they do insure care in providing for the safety of their passengers. What the passenger does accept are those risks and inconvenience inevitably inseparable from any business even when carefully conducted;<sup>65</sup> those dangers and distresses which no degree of care reasonably to be required can avoid.<sup>66</sup>

In *Purcell v. R. R.*<sup>67</sup> the defendant's act being negligent as threatening material injury to the ordinary passenger and not to some peculiarly sensitive passenger only, the plaintiff was allowed to recover, since actual injury had resulted proximately to her; as Phillimore, J., said, "The fact of one link in the chain of causation being mental only makes no difference."

The defendant, a carrier of passengers, was guilty of an act which as to the plaintiff, a passenger, was undoubtedly negligent as subjecting her to the risk of grievous personal injury or even death; it ran its car so carelessly that a collision with a railroad train was only escaped by the merest good fortune;<sup>68</sup> by good luck she escaped direct impact, but sustained a severe nervous shock, which caused, as according to medical testimony it naturally would, a serious physical illness.

The court, Gilfillan, C. J., says a duty of highest care is shown, also "negligence as to that duty and if that negligence caused what the law regards as actionable injury the action is well brought. Of course negligence without injury gives no right of action." He then says, "It may be conceded that any effect on the mind alone would not furnish a ground of action," but here he says there is a physical injury as serious as breaking a leg. The only question is whether the injury is the proximate result of defendant's negligence.

<sup>65</sup> What care is it to the public interest to require, is the question which the court in *Spade v. R. R.*, 168 Mass. 285, is discussing in the passage quoted by Phillimore, J.

<sup>66</sup> This is admirably expressed at some length by Holmes, C. J., when the case again came up for review upon retrial, 172 Mass. 488.

<sup>67</sup> 48 Minn. 134 (*supra*).

<sup>68</sup> Facts almost identical with those in *Twombly v. R. R.*, 69 N. Y. 158 (*supra*).

"The only new independent cause<sup>69</sup> which can possibly be said to intervene between the wrong is the plaintiff's condition of mind, her fright. Now, if the fright was the natural consequence of the defendant's negligence, and the fright caused the nervous shock and convulsion, and consequent illness, the negligence was the proximate cause of the injuries." "A mental condition or operation coming between the negligence and injury does not necessarily break the required sequence of intermediate causes," citing cases where plaintiff's action under influence of sudden peril causes the injury. He rejects also the argument that her pregnancy, and not the defendant's negligence was the true cause of her injury.

The decision ends by saying the carrier might not be liable to a peculiarly sensitive person for an injury caused by an act or omission not negligent as to an ordinary passenger, nor would he owe such person any higher duty of care than to passengers generally.

Thus it is seen that all the cases refusing recovery are based on one or more of the following reasons:

1. The basis of the action is the fright; the physical injury is but proof of the severity of the fright and of the extent of the resulting injury.<sup>70</sup>

2. If recovery is allowed for physical injury caused by a wrong through the medium of shock or suffering it is impossible to refuse it where only shock or suffering result.<sup>71</sup>

3. That to allow recovery will end in requiring a degree of care impossible to comply with and repugnant to all principles of public expediency.<sup>72</sup>

4. It is against Public Policy; it is difficult to prove except by plaintiff's testimony, which if admitted as a proper

<sup>69</sup> And by independent is meant an agent not itself a product of the wrong; by intervening, intervening to cause a new result; an agent adequate to bring about the injurious result.

<sup>70</sup> *Mitchell v. R. R.*, 151 N. Y. 107. So also *Ewing v. R. R.*, 147 Pa. 40; and *Victoria Com. v. Coultas*, L. R., 13 A. C. 222; *Spade v. R. R.*, 168 Mass. 285.

<sup>71</sup> Same cases.

<sup>72</sup> *Ewing v. R. R.*; *Spade v. R. R.*; *Braun v. Craven*, 175 Ill. 401 (1899).

medium of proof, is almost impossible to controvert, and it will encourage litigation.<sup>73</sup>

5. It is too remote a consequence.<sup>74</sup>

In answer to these it may be said :

1. The fright is not the ground of action—the physical injury is the damage alleged; the fright is but stated as indicating the causal connection between the wrong and the injury. There is no greater reason in holding the fright the substantive cause of action in such cases than in those where the fright causes plaintiff or some other person or animal to act to his detriment.<sup>75</sup>

2. The recovery can be had where physical injury ensues, for that is legal damage; not when only mental suffering results, for that is not legal damage. Kennedy, J., *Dulieu v. White; Purcell v. R. R.*

3. This involves a confusion between the elements necessary to the existence of negligence, and the maintenance of the action. Unless the act threaten legal injury, some palpable material harm, it is not negligent; if it threaten such harm it should be actionable if legal injury results though the harm suffered occurred in a way not precisely to be expected. Thus to allow a recovery cannot extend the measure or scope of the care required to escape negligence. No act will be considered negligence merely because in fact it causes fright and injury through it, if it had no tendency to cause anything but fright. See Kennedy, J.'s statement that the shock must be the result of reasonable fear of personal violence to plaintiff himself, and Gilfillan, C. J., at end of opinion in *Purcell v. R. R.*

4. The physical injury can here be proved like any other, by disinterested testimony, the causal connection by medical testimony quite as accurately as many of the intricate consequences of a physical impact, and that it encourages litigation is equally applicable to the original allowance of all the early actions on the case; it is the policy of the law

<sup>73</sup> *Mitchell v. R. R.*; *Spade v. R. R.*; *Ewing v. R. R.*

<sup>74</sup> *Braun v. Craven*; *Mitchell v. R. R.*; *Ewing v. R. R.*; *R. R. v. Coultas*.

<sup>75</sup> *Purcell v. R. R.*; *Hayter v. R. R.*; *Mack v. R. R.*



to encourage just litigation. See Kennedy, J., *Dulieu v. White*.<sup>75a</sup>

5. The injury is not too remote. The fact that the link in the chain of causation is mental does not disturb the orderly natural sequence of events.<sup>76</sup> A mental condition itself caused by the wrong is not an intervening agent.<sup>77</sup> Whether it has followed the shock naturally, and whether the shock is the reasonable natural result of the negligence is usually a question of fact for the jury.

"The relation between fright and injury to the nerve and brain structures (and it may be added through them to other parts of the body) is a matter which depends entirely upon scientific and medical testimony,"<sup>78</sup> just as do in fact the relation to the wrong of many physical after-effects when immediate impact occurs.

None of the objections urged being tenable it would seem that recovery should be allowed on the fundamental principle that where legal injury has resulted proximately from a wrong, there is always a right of action for damages.

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