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Torts—Impact Theory Overruled

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Tax[51] was unconstitutional as applied to its activities. Petitioner is a broker performing administrative services for domestic exporters and foreign importers in connection with the shipment of American-produced goods through the port of New York. This entails booking space aboard vessels, co-ordinating delivery of the goods to the pier in time for sailing, preparing Customs forms and bills of lading, arranging for insurance, and advancing ocean freight money. For these services it receives a fee based on the amount of time its employees devote to each shipment. It is on this income that the local tax was imposed. No attempt was made to tax petitioner's receipts from the carriers with which it did business.

On the basis of its recent decision in *Berkshire Fine Spinning Associates Inc. v. City of New York*,[52] the Court of Appeals affirmed, as had a unanimous Appellate Division,[53] the dismissal of the complaint.[54] In the *Berkshire* decision, the Court had conducted an extensive analysis of the Supreme Court decisions on the subject in an attempt to define the permissible scope of a local tax imposed on the privilege of doing business. There it noted that "local authorities may validly tax the privilege of doing business locally if the local business operations though related to interstate movements of goods extend substantially beyond the sale and promotion of the products and include a 'local incident' which is 'sufficient to bring the transaction within its taxing power.' "[55] The test is whether the activity sought to be taxed is "such an integral part of the interstate process, the flow of commerce that it cannot realistically be separated from it."[56]

While the test may be readily stated, its application presents a more difficult problem. In the instant case, although petitioner's services are connected with and important to foreign commerce, they are local in scope, are performed for non-carriers and do not include any actual transportation services. Further, receipts for services rendered to carriers were not included in those sought to be taxed. The case in fact represents an instance where a difficult rule of law has been deftly applied.

Bd.

TORTS

IMPACT THEORY OVERRULED

After sixty-five years of adherence, distinction, exception, and avoidance, the New York Court of Appeals has expressly overruled *Mitchell v. Rochester*

51. New York City Admin. Code § B46-2.0. Cities in New York State having a population of one million or more are permitted to impose a gross receipts tax. N.Y. Gen. City Law § 24(a).

52. 5 N.Y.2d 347, 184 N.Y.S.2d 623 (1959), noted 9 Buffalo L. Rev. 79 (1959).

53. 10 A.D.2d 841, 200 N.Y.S.2d 359 (1st Dep't 1960).

54. 17 Misc. 2d 104, 184 N.Y.S.2d 142 (Sup. Ct. 1959).

55. Supra note 52 at 355, 184 N.Y.S.2d at 628, citing Norton Co. v. Department of Revenue, 240 U.S. 534, 537 (1951).

56. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954).

Railway Company.[1] In so doing, it has removed New York from a decreasing minority of jurisdictions in which recovery is denied in negligence cases for physical injury resulting from fright or shock alone.

Since it was handed down, *Mitchell* has been subjected to severe criticism by judges and writers alike.[2] In that case, plaintiff was standing on the sidewalk waiting to board one of the defendant's stopped horse cars. As another of the defendant's cars approached her, the team drew to the right and came so close that she stood between their heads when they were finally stopped. As a result of her fright and excitement from the proximity of the horses, she fainted and subsequently suffered a miscarriage and consequent illness. Recovery was denied for three reasons: first, assuming that fright cannot form the basis of an action, the Court believed it obvious that no recovery could then be had for injuries from fright; second, plaintiff's injuries were not the proximate result of defendant's negligence in that they could not be reasonably foreseen; third, to allow recovery in the absence of an immediate personal injury would result in "a flood of litigation" in which injury may easily be feigned and damages would rest on mere speculation.

That *Mitchell's* reasoning is subject to criticism has been noted many times.[3] The Court's first argument, that since recovery cannot be had for fright alone, recovery should not be allowed for the results of fright, is clearly a *non sequitur*. A primary reason why there is no recovery for fright is that plaintiff suffers no measureable damages. But where physical injury results; this objection disappears. The *non sequitur* results from the failure to differentiate between fright as the injury for which recovery is sought and as a mere link in the chain of causation.

The holding that plaintiff's injuries were not the proximate result of the Railway's negligence becomes a less tenable position as time and science progress. It has long been known that severe fright or shock may cause physical injuries.[4] One who subjects another to fright of such a nature can reasonably be expected to understand that some physical injury may ensue and should be liable.[5] Modern science is now better able to demonstrate the means by which psychic causes may have definite physical effects.[6]

The final argument of the Court in *Mitchell* is unquestionably the main one. Once recovery is allowed without a physical injury or "impact," the courts would be inundated with litigation based on false claims or conjectural damages. But subsequent decisions applying *Mitchell* have demonstrated the basic weaknesses and unsoundness of this contention. Indeed, New York courts and courts

1. 151 N.Y. 107, 45 N.E. 354 (1896).
2. See articles cited in Battalla v. State, 10 N.Y.2d 237, 239 n.1, 219 N.Y.S.2d 34, 36 n.1 (1961).
3. New York Law Rev. Comm., 1936 Report, pp. 410-422.
4. Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931); Hack v. Dady, 142 App. Div. 510, 127 N.Y. Supp. 22 (2d Dep't 1911).
5. See Prosser, Torts 176-178 (2d ed. 1955).
6. Smith, Relation of Emotions to Injury and Disease, 30 Va. L. Rev. 193 (1944).

in similar "impact" jurisdictions faced with a meritorious claim have gone to startling and even ridiculous extremes to find a physical contact sufficient to allow recovery yet remain within the requirements of *Mitchell*.[7]

In *Comstock v. Wilson*[8] plaintiff's car was lightly struck from behind by defendant's auto. Neither plaintiff nor his wife was injured. Plaintiff's wife stepped from the car and began writing down defendant's license number. While doing so, she fainted and fell to the sidewalk, fracturing her skull. The Court of Appeals itself allowed recovery, saying that the collision of the cars was close enough in time and space to present a jury question of fact on proximate cause. A forcible seating on the floor,[9] dust in the eye,[10] inhalation of smoke,[11] a slight burn,[12] a bumping against a buggy seat,[13] have all been sufficient "impact" to permit substantial recoveries for mental disturbance and its physical results. Without doubt the most remembered case in this field is the Georgia circus case in which the requisite "impact" was the evacuation of a horse's bowels into plaintiff's lap.[14]

While the requirement of a physical contact was intended to prevent fraudulent claims, it may be contended that its results have backfired. One who would prosecute a fraudulent claim would hardly hesitate to fabricate a slight unauthorized contact sufficient to meet this legal requirement. On the other hand, those with truly worthy claims would be penalized for their refusal to be dishonest. These "slight-impact" cases also demonstrate clearly the weakness of *Mitchell's* proximate cause argument. The slight battery involved in a jarring or in the inhalation of smoke can in no sense be foreseen to result in the damages, often substantial, recoverable by the plaintiff.

The same courts that have found means of satisfying the contact requirement so readily, and others not so inclined, have found reasons to exclude entire areas of litigation from the bonds of *Mitchell*.[15] In certain burial cases, damages have been allowed for both physical and mental injuries. "It is now well settled that an unlawful invasion of the right of funeral, interment or other lawful disposition of the remains is a tort, and is the subject of an action for damages."[16] Another means of avoiding the harshness of *Mitchell* has been to find a breach of a contractual duty upon which to attach either mental or

7. Prosser, supra note 5 at 178-179.
8. Comstock v. Wilson, supra note 4.
9. Driscoll v. Gaffey, 207 Mass. 102, 92 N.E. 1010 (1910).
10. Porter v. Delaware, L. & W. R. Co., 73 N.J.L. 405, 63 Atl. 860 (1906).
11. Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).
12. Powell v. Hudson Valley R.R., 88 App. Div. 133, 84 N.Y. Supp. 337 (3d Dep't 1903).
13. Wood v. N.Y. Central & H.R.R.R., 83 App. Div. 604, 82 N.Y. Supp. 160 (4th Dep't 1903), aff'd, 179 N.Y. 557, 71 N.E. 1142 (1904).
14. Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928).
15. For an extended discussion of these areas see McNiece, Psychic Injury and Tort Liability in New York, 24 St. John's L. Rev. 32-65 (1949).
16. Lubin v. Sydenham Hospital, 181 Misc. 870, 871, 42 N.Y.S. 2d 654, 656 (Sup. Ct. 1943). See also Stahl v. William Necker, Inc., 184 App. Div. 85, 171 N.Y. Supp. 728 (1st Dep't 1918).

physical injuries from a mental disturbance. Thus, a railroad passenger may recover for mental anguish (even *without* resulting physical consequences) after being subjected to abusive language by a railroad employee,[17] and a hotel guest may recover for false accusations of immorality.[18]

Workmen's Compensation cases dispense completely with the impact requirement, for injuries caused by an accident within the scope of employment need not be shown as natural and probable consequences.[19] And in some cases involving food, a breach of warranty has been found upon which to attach resultant damages. Thus, where through defendant's negligence a field mouse had somehow found its way into a kidney sauté, the plaintiff recovered for violent illness from shock.[20]

Where the act resulting in mental disturbance followed by physical illness is wanton or intentional, most New York courts will allow recovery without evidence of physical contact. The *Mitchell* decision is generally limited to negligent torts.[21]

By the examples above, it appears that in certain areas many courts are not afraid to allow claims either involving a minor impact or no impact at all. No fear has been expressed that many of these recoveries are based on fraudulent claims. In those cases, there have been no great protests that judges or juries have been unable to measure the damages for physical injury following mental distress. As medical science becomes more sophisticated in the subtleties of legal proof and more knowledgable in the complexities of the human mind, its experts are better able to aid either in establishing a valid injury claim or in exposing a fraudulent one.[22]

It is in this setting that *Mitchell* has been overruled by a four to three decision in *Battalla v. State*.[23] The infant plaintiff, aged nine, was placed in a ski lift by a state employee who allegedly failed to secure the seat belt properly. On the ride down, without the protection of the safety belt, she became frightened and alleged "severe emotional and neurological disturbances with residual physical manifestations." The Court of Claims denied the State's motion to dismiss.[24] The Appellate Division reversed,[25] believing itself bound by *Mitchell v. Rochester Railway Co.* On appeal, the Court of Appeals reversed the Appellate Division, finding that a cause of action had been stated.

The Court first noted the rejection of an impact requirement in most jurisdictions and the exceptions to the rule developed by the minority which give

17. Gillespie v. Brooklyn Heights R.R., 178 N.Y. 347, 70 N.E. 857 (1904).
18. De Wolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908).
19. McNiece, supra note 15 at 58.
20. Barrington v. Hotel Astor, 184 App. Div. 317, 171 N.Y. Supp. 840 (1st Dep't 1918). See also Sider v. Reid Ice Cream Co., 125 Misc. 825, 211 N.Y. Supp. 582 (Sup. Ct. 1925).
21. Williams v. Underhill, 63 App. Div. 223, 71 N.Y. Supp. 291 (1st Dep't 1901).
22. Smith, supra note 6 at 212-226.
23. 10 N.Y.2d 237, 219 N.Y.S.2d 34 (1961).
24. 17 Misc. 2d 548, 184 N.Y.S.2d 1016 (1959).
25. 11 A.D.2d 613, 200 N.Y.S.2d 852 (3d Dep't 1960).

it lip-service. Then turning to *Mitchell*, Judge Burke, writing for the majority, acknowledged that the unanimous Court in *Comstock*,[26] had "rejected all but the public policy arguments of the Mitchell decision." At this point the Court attacked this remaining public policy stand for many of the reasons cited above. Fraudulent injuries are recognized as capable of being fabricated in "slight-impact" cases and in the several areas of exception.[27] And the Court finally admitted that the difficulty of determination of damages should not cause the courts to abrogate part of their duties, to the detriment of honest claimants. "In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims."

The dissenting opinion by Judge Van Voorhis, concurred in by Judge Dye and Chief Judge Desmond, reached a contrary conclusion on the issue of fraudulent claims. Quoting at length from the *Mitchell* opinion, the minority stressed again the danger of false claims or claims "for the most intangible and elusive injuries" and noted the difficulty of assessing damages. Judge Lehman's opinion in the *Comstock* case is relied upon in part: "Serious consequences from *mere* mental disturbance unaccompanied by physical shock cannot be anticipated, and no person is bound to be alert to avert a danger that foresight does not disclose." (Emphasis added.) But use of the word "mere," loads the answer for Judge Lehman and the present minority. Mental disturbance sufficient to cause serious physical consequences is usually not "mere." For example, recovery was denied to plaintiff for loss of his wife's services when she prematurely delivered a stillborn baby after the shock of seeing plaintiff beaten by defendant.[28] Was this shock a "mere" mental disturbance? Or is the fright and fear-for-life of a nine year old child at descending in an open ski lift "mere"? It is true, in the sense that "there is no legal right to mental security," that the law should not give a remedy for injured feelings or even moral repulsion.[29] But should not an actor be liable for a serious mental trauma resulting in physical damages? It is not suggested that the rule of natural and proximate results be forgotten, but the law of damages has not required that an actor be able to foresee the exact results of his act.[30] Expert medical testimony can now shed considerable light on the physical results of certain mental injuries. In *Ehrgott v. Mayor of City of New York*,[31] cited by the majority, the Court of Appeals said: "A wrong-doer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury."

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26. Comstock v. Wilson, supra note 4.
27. Citing the burial rights cases, contract relationship cases, Workmen's Compensation cases and others examined by McNiece, supra note 15.
28. Hutchinson v. Stern, 115 App. Div. 791, 101 N.Y. Supp. 145 (4th Dep't 1906).
29. Prosser, supra note 5 at 176-181.
30. Id. at 258.
31. 96 N.Y. 264 (1884).

There is considerable justification for the dissent's fears that a "Pandora's box" of false claims will be opened and that a judge or jury might be convinced of a causal connection by "purchased" expert medical testimony. If there were no merit in these apprehensions, perhaps *Mitchell* would have fallen much sooner. But the exceptions to the rule have shown that it does not effectively eliminate many bad claims, but may only inhibit the prosecution of many good ones. And while medical testimoy may be presented by the plaintiff to support an unjust claim, it may also be used by the defense to disprove it.

Future cases may prove the decision in *Battalla* to be the wrong one. But it is more likely, looking at the experience of other "non-impact" states, that the majority will be vindicated. In the tradition of *Rumsey v. New York & N.E.R.R. Co.*[32] and more recently *Woods v. Lancet*,[33] the Court has reexamined a much-criticized rule of the past "without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."[34] The exceptions to and deviations from *Mitchell* had left this area of New York case law in an uncertain state. By the instant decision, the Court of Appeals has relieved much of this confusion and aligned itself with the reasoned position and not-unhappy experience of the majority of states.

R. V. B.

PRIVITY OF CONTRACT NO LONGER NEEDED IN CERTAIN WARRANTY ACTIONS

Until recently, the New York courts had continued unchanged the long standing rule that recovery in warranty, express or implied, could not be allowed in the absence of privity of contract.[35] The rule rested on the concept that a warranty is an incident of a contract, running only between the seller and one in contractual relationship (privity) with him.[36] Under the rule, retail dealers, manufacturers, and wholesalers stood immune to warranty actions by claimants other than the actual purchasers of injurious products.

The obvious harshness of the rule prompted the courts to fashion imaginative devices to supply or, more accurately, evade the privity rule in finding for certain nonpurchaser claimants. A long line of cases has used the device of the agency doctrine. The Court of Appeals first applied the device in *Ryan v. Progressive Stores, Inc.*[37] to permit a claimant, whose wife was the actual purchaser, to recover in warranty on the ground that the wife acted as the claimant's agent. The mere relationship of husband and wife gave rise to the presumption that the husband's funds were used to make the purchase. Other agency cases have included such successful claimants as: the sister of the

32. 133 N.Y. 79 (1892).
33. 303 N.Y. 349, 102 N.E.2d 691 (1951).
34. Kent's Com. (13th ed.) 477, cited in Woods v. Lancet, supra note 33 at 355, 102 N.E.2d at 694.
35. Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928).
36. Fairbank Canning Co. v. Metzger, 118 N.Y. 260, 23 N.E. 372 (1890).
37. 255 N.Y. 512, 157 N.E. 828 (1927).