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FRIGHT AND MENTAL ANGUISH AS AN ELEMENT OF DAMAGES*

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In both the Greek and the Roman law injury to the person meant injury to honor or insult but came later to mean any wilful disregard of another's personality. In consequence the beginnings of law measure composition not by the extent of the injury to the body, but by the extent of the injury to honor and the extent of the desire for revenge aroused, since the interest secured is really the social interest in preserving the peace. 28 Har. L. Rev. 357.

The law secured the individual's interest in his honor at least as soon as his interest in his physical person, presently it distinguished between injuries to the person and injuries to honor and reputation, but it has moved very slowly in protecting feeling in any respect other than against insult or dishonor. Three steps may be noted. At first only physical injury is considered. Later overcoming the will is held a legal wrong; in other words an individual interest in free exercise of the will is recognized and secured. Finally the law begins to take the account purely subjective mental injuries and to even regard infringement of the sensibilities of another.

Our government exists for the benefit of the governed, and this benefit is afforded in the establishment and the protection of rights. Every law exists for the purpose of establishing and protecting legal rights. A legal right is a right with which the law invests one person and in respect to which, for his benefit, a duty is imposed on another or others to do or refrain from doing certain acts. Whenever a right is given, the duty to respect such right springs into existence. "Violation of right' and 'breach of duty' are Equivalent terms." Hale On Damages, 11.

The one fundamental right of which all men are desirous, and for the enforcement of which governments are established, is the right not to be harmed in any respect which affects their being and well being, their happiness, and immunity from pains. The rights and liberties of the individual are restricted in so far

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as they interfere with the rights and liberties of others. When an individual so uses his own as to cause injury to another he violates a right owing to that other party. Our governments through their legislatures and courts, to avoid the destructful state that would naturally follow if personal vengeance were allowed, have worked out a system of damages whereby the injured party may receive redress in our courts.

The justice and fairness of protecting the individual against injury resulting from fright and nervous shock and even against purely mental injury is very apparent. The Courts, however, have been very reluctant in considering fright and mental anguish as an element of damage. The obstacles which seem to impede the path of justice in such cases are threefold: (1) Fright in itself is too intangible and uncertain to allow a recovery for it alone, and as there can be no recovery for it alone there should be no recovery for damages arising from fright; (2) that the physical consequences of fright are too remote, or in other words are not the proximate result of the defendant's act; and (3) that expediency demands that there be no recovery for the physical or mental consequences of fright.

The development of this subject in the field of damages has been slow and cautious. We find it first considered with wilful wrongs and contemporanoues physical injuries. Then in the case where the fright and mental shock results in some physical injury. And finally where the only injury suffered is purely mental.

The case where the fright and mental anguish is found accompanied by a contemporaneous physical injury is the least difficult of the problems with which we have to deal. In this case we have the action brought for the contemporaneous injury and not for the fright. Thus we have the principles as laid down, by obiter, by Holmes, J. in *Spade v. Lynn & B. R. Co.* 172 Mass. 488: "By something of an anomaly, consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages if the conduct has some other consequences for which an action lies". The injury then resulting from fright, the fright being caused by the act of physical injury, the resulting damages may be proved. But it is contended in some cases that the injury resulting from fright or mental anguish is too remote for a recovery to be allowed.

121 N. Y. Supp. 22; 52 N. E. (Mass.) 747.[1]

The greatest difficulty arises where the injury is purely mental with no readily ascertainable physical effects. The opportunity for the practice of fraud and imposture raises the question of the expediency of allowing it to be considered in assessing damages. The mere hardship of estimating the damage suffered should not, however, prevent the injured party from recovering for a wrong suffered and has been handled with satisfaction by the courts.

The principle that recovery may be had where the fright and mental anguish is accompanied by a contemporaneous physical injury is fairly well settled as a review of the practical unanimity of modern decisions in this country will show.[2]

Allowing the recovery of damages for injuries for which no cause of action lies is but a step to the acknowledgement of such a cause of action. To quote from, Street, Foundations of Legal Liability, I, 470; "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor that is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of legal liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law".

The case which best illustrates this principle is the one in which the fright or nervous shock unaccompanied by any impact or other actionable injury, develops into palpable physical injury. Some of our courts in dealing with this proposition have been inclined to deny recovery and to follow the ruling in *Victorian Railways Commissioners v. Coultas*, 8 Eng. Rul. Cases 405, which laid down the rule; "Damages that are not natural, probable, immediate, or proximate consequences of a wrongful act are not recoverable".[3]

While other courts hold a more limited rule to the effect that there can be no recovery for injuries resulting from fright occasioned by negligence where there is no immediate personal injury, trespass to realty, nor any contract relation.[4]

1 But see 211 N. Y. Supp. 583, and 132 N. E. (Mass.) 622 apparently reversing these decisions.

2 Louisville & N. R. Co. v. Roberts (1925), 269 S. W. (Ky.) 333; Sider v. Reid Ice Cream Co. (1925). 211 N. Y. Supp. 583; Kisiel v. Holyoke Street R. Co. (1921), *31 N. E. (Mass.) 622; Hines v. Evans (1920), 105 S. E. (Ga.) 59; Pennsylvania Co. v. White (1927), 242 Fed. 437.

3 Haile v. Texas & P. R. Co. (1894), 60 Fed. 557; Braun v. Craven (1898), 51 N. E. (Ill.) 401. Weissman v. Wells (1924), 267 S. W. (Mo.) 400.

4 Smith v. Gowdy (1922), 244 S. W. (Ky.) 678; Reed v Ford (1908), 112 S. W. (Ky.) 600; Alexander v. Pacholek (1923), 192 N. W. (Mich.) 652.

These cases denying recovery hold that such damages are too remote; that they cannot be considered the proximate result of defendant's act because of the intervening fright; but before an intervening cause may operate to insulate defendant's negligence, it must be an independent cause,—one not set in motion by the defendant. So if defendant's negligence was the proximate cause of the fright, and fright, in probable and natural sequence, the proximate cause of physical injury, the chain of causation is complete, and the fright is not an independent cause. *Purcell v. St. Paul City R. Co.* 50 N. W. (Minn.) 1034. On the other hand we have the argument that, since fright alone is too intangible and uncertain to allow a recovery for fright alone, there can be no recovery for the consequence of fright. These courts, however, lose sight of the fact that in the second case the basis of the action is not the fright but the physical injury, a tangible, material harm, which the court has always regarded as a legal injury. 3 L. R. A. (N. S.) 49.

In *Lindley v. Knowlton* (1918), 176 Pac. (Cal.) 440, the action was for injuries to the physical health of the plaintiff due to an attack on her and her children by an escaped chimpanzee. Plaintiff was not touched by the chimpanzee and her injury was due solely to fright. The court in distinguishing this case from those in which fright was the sole gravaman held that in the case at bar physical detriment was pleaded and that there was evidence in support thereof.

On the whole there is apparently no good reason why the wrongful invasion of a legal right (and surely the inviolability of the person is a legal right,) causing an injury to the body or mind which reputable physicians recognize and can trace with a reasonable degree of certainty to the act as its true cause, should not give to the injured party a right of action against the wrongdoer, although there was no visible hurt at the time of the action complained of. Of course there is always the possibility of trumped up charges where no evidence of bodily injury can be traced immediately. However, the matter is in the hands of the courts, and by the use of sound discretion under proper instructions from the court the jury will take care of this.

Thus this proposition may be sumed up as held in *Simone v. Rhode Island* C. 66 Atl. (R. I.) 202: "Where the negligence of a

defendant is such as to cause fright, and as a natural consequence of such fright a series of physical ills follows, or if the fright as a cause gives rise to nervous disturbances and those in turn to physical troubles, the defendant is liable for the physical results of its own negligence, although there was no actual physical injury at the time of the accident."[5]

Having considered fright and mental shock causing a physical injury we now come to the case of purely subjective mental injuries and injuries to the sensibilities.

It was well settled at common law that mere injury to the feelings or affections, though wrongful, did not constitute an independent basis for the recovery of damages. As a general rule, following this theory and supported by the weight of authority, mental pain and suffering will not alone constitute a basis for recovery of substantial damages. This rule is not, however, without exceptions and it is well recognized that a recovery may be had in actions for breach of contract to marry, and certain cases of wilful wrong, especially those affecting the personal security, character of reputation, or domestic relations of the injured person, in whch cases mental suffering is recognized as the ordinary, natural, and proximate consequence of the wrong complained of. In any event a very slight injury constituting a ground of action will support a recovery for accompanying[6] mental suffering. In all the cases so holding the right of action arises out of tort or breach of contract and is not based solely upon the mental anguish.

The apparent reason for the courts' refusal to sustain an independent action is laid to the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. That such injuries are more sentimental than substantial. Having their basis in the physical and nervous condition of the complaining party, the suffering of one under precisely the same circumstances being no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated or

5 Hanford v. Omaha & Council Bluffs St R. Co. (925), 203 N. W. (Neb.) 643; Central of Georgia R. Co. v. Kimber (1924), 101 So. (Ala.) 827; Lambert v. Brewster (1924), 125 S. E. (W. Va.) 244; Kenney v. Wong Len, (1925), 128 Atl. (N. H.) 343; 11 A. L. R. 1119.

6 17 C. J. 831; Gardner v. Cumberland Tel. Co. et al (1925) 268 S. W. (Ky.) 1108; 251 S. W. (Ark.) 355, 1923; Stein v. Greenebaum (1918), 203 S. W. (Tex.) 809; Dalzell v. Dean Hotel Co. (1916), 186 S. W. (Mo.) 41; Koerber v. Patek (1905), 102 N. W. (Wis.) 40; see 23 A. L. R. 361.

even approximately measured. Easily stimulated and impossible to disprove it is said to fall within all the objections of speculative damages, which are universally excluded because of their uncertain character. *Summerfied v. Western Union Tel. Co.* N. W. (Wis.) 973.

However, this rule against uncertain or contingent damages applies only to those damages which are not the certain result of the breach, and not to such as are the certain results but uncertain in amount. Every day the courts handle cases in which substantial damages are established, but the amount is, in so far as susceptible of pecuniary admeasurement, either uncertain or extremely difficult of ascertainment; in such cases the recovery is allowed and the amount is fixed by the jury in the use of sound discretion under proper instructions from the court. 17 C. J. 756-757.

Granting that it is a cardinal rule that when damages are assessed against anyone such damages must be actual and real—not conjectural or speculative, this rule is to promote and not to defeat justice. As was said in *Couch v. Kansas Southern R. Co.* 158 S. W. (Mo.) 347, in speaking of this rule: "This, however, is only an abstract rule of law; a general guide to be followed so long as it promotes justice, and to be put aside when it leads in the opposite direction."

Man's security in his person is a right recognized by law and zealously guarded by the courts. Yet, is the mind any less a part of the person than the body, and the injury suffered any less consequential because there is no physical manifestation of it? Mental suffering is sometime more acute and lasting than physical pain. Indeed the suffering of each frequently, if not usually, acts reciprocally on the other. In fact it is impossible to conceive of physical suffering without attending mental suffering. The courts, realizing this have, in the majority of case allowed a recovery for the mental suffering in assessing the damage in such actions.

In a large class of actions for torts in which substantial damages are authorized and sustained for the injury to the feelings of the plaintiff the other damage is merely nominal. As instances of such actions, we have the case of the husband suing for

an injury to his wife, or for seducing or enticing her away from him, and that of a parent suing for the seduction of his daughter. In these cases the real injury sued for is the injury to the feelings and not the loss of services. "The loss of services upon which the actions are technically based being but a legal fiction, and more imaginary than real." *Wadsworth v. Western Union Tel. Co.* 8 S. W. (Tenn) 574. Thus we find that which is denied a right in itself given that right under the guise of another action.

Due to the reluctance of the courts to go against established precedent fright and mental anguish is denied as an independent cause of action. Yet, as we have seen the majority of the courts recognizing the justice and fairness of such a recovery have allowed it as a parasitic element of damage under one action or another. As the physical injuries due to fright were at first allowed only as a parasitic element of damage, then made an independent cause of action, so is the development of purely subjective mental injuries. Today, purely subjective mental suffering is recognized as a parasitic element of damage; tomorrow, it will constitute an independent cause of action.