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Recovery For Physical Injury Resulting From Fright Without Impact - Battalla v. State

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Recovery For Physical Injury Resulting From Fright Without Impact

Battalla v. State[1]

Infant plaintiff was placed in a chair lift at Bellayre Mountain Ski Center by a state employee who failed to secure and properly lock the belt intended to protect the occupant. As a result of this negligence the child became frightened and hysterical upon descent and suffered "consequential injuries." Plaintiff brought suit in the Court of Claims of New York.[2] The State's motion to dismiss the claim was denied.[3] The State appealed, and the Supreme Court, Appellate Division, reversed the order and dismissed the claim.[4] Claimant appealed, and a divided Court of Appeals, in overruling a previous decision to the contrary, held that the claim stated a cause of action.[5]

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[1] 10 N.Y. 2d 237, 176 N.E. 2d 729 (1961).

[2] 17 Misc. 2d 548, 184 N.Y.S. 2d 1016 (1959). New York has a general waiver of immunity statute which provides that the tort liability of the state is to be determined in accordance with the same rules of law as applied to an action against an individual or corporation. N.Y. CT. CL. Act § 8; see also McKINNEY, N.Y. CONST. Art. 6, § 23. See Note, *Liability Of Municipal Corporations Under The State's Statutory Waiver Of Tort Immunity*, 20 Md. L. Rev. 353 (1960).

[3] The Court of Claims was of the opinion that Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896), which had held there can be no recovery for injuries, physical or mental, incurred by fright negligently induced, should be overruled.

[4] 11 A.D. 2d 613, 200 N.Y.S. 2d 852 (1960). The court stated that the case was controlled by Mitchell v. Rochester Ry. Co., *ibid.*

[5] The claim stated that the plaintiff suffered "severe emotional and neurological disturbances with residual physical manifestations. . . . " Battella v. State, *supra*, n. 1.

Cases wherein damages for mental disturbance have been sought fall generally into one of four classifications:

(1) Where mental anguish alone without any physical injury is caused by a negligent, but not willful, act[6] courts have denied recovery except in rare instances.[7] Recognition of this established rule was accorded by the Maryland Court of Appeals by dictum in *Green v. Shoemaker*.[8]

(2) Where defendant's negligence was directed at, and caused injury to, a third person, the general rule is that plaintiff can not recover for a mental or emotional disturbance or for bodily injury resulting therefrom in the absence of a contemporaneous impact.[9] The usual reason given is that, as to plaintiff, no duty was breached by defendant. Thus, in *Resavage v. Davies*,[10] the Court of Appeals denied recovery for nervous shock and resulting physical injury to a mother who had witnessed her two daughters struck and killed by defendant's negligently operated car.

(3) Whenever damages are sought by plaintiff for mental disturbance accompanying a physical injury sustained as a result of some negligent conduct on the part of defendant, the courts have uniformly allowed compensation as a valid element in damages.[11]

(4) However, where the physical harm complained of results solely from the mental disturbance, as in

[6] 8 M.L.E. 57, Damages, § 64; 25 C.J.S. 550, Damages, § 64.

[7] Principally, negligent transmission of a telegraph message outrageous on its face, Russ v. Western Union Telegraph Co., 222 N.C. 504, 23 S.E. 2d 681 (1943); negligent mishandling of corpses, Klumback v. Silver Mount Cemetery Ass'n, 242 App. Div. 843, 275 N.Y.S. 180 (1934); and foreign matter in food, Sider v. Reid Ice Cream Co., 125 Misc. 835, 211 N.Y.S. 582 (1925).

[8] 111 Md. 69, 77, 73 A. 688 (1909): "[I]t may be considered as settled, that *mere fright, without any physical injury resulting therefrom*, cannot form the basis of a cause of action." See also the Court's statement in Sloan v. Edwards, 61 Md. 89, 106 (1883). For an extensive treatment of the subject see Annot., *"Right to recover for mental pain and anguish alone, apart from other damages"*, 23 A.L.R. 361 (1923), supplemented in 44 A.L.R. 428 (1926) and 56 A.L.R. 657 (1928).

[9] 8 M.L.E. 60, Damages, § 67, fn. 33; 52 Am. Jur. 417, Torts, § 70; 25 C.J.S. 554, Damages, § 67; 2 RESTATEMENT, TORTS (1934) § 312, comment (e).

[10] 199 Md. 479, 86 A. 2d 879 (1952); RESTATEMENT, *supra*, n. 9, was cited and qualifiedly approved.

[11] Sloan v. Edwards, 61 Md. 89, 106 (1883): "And while it is true, the law cannot value, and does not compensate for mental pain or suffering when the act complained of causes that alone, yet when it is connected with, and follows as a natural consequence of, a material wrong or injury, it is a legitimate element of damage. . . . " 8 M.L.E. 57, 58, Damages, §§ 63, 65; 15 Am. Jur. 593, Damages, § 176; 25 C.J.S. 549, Damages, § 63.

the *Battalla* case, there is a sharp conflict in the authorities. In fact, one leading legal reference asserts that "[T]he authorities are in a state of dissention probably unequaled in the law of torts."[12] The division of the Court in the *Battalla* case indicates the divergence of views as to what is or should be the law.

Presence or absence of any "physical impact" has given rise to the jurisdictional cleavage. If plaintiff can prove impact, all jurisdictions will allow recovery, other necessary elements being present. But when there is no showing of an instrumentality of defendant, the courts are divided.[13]

Courts have been reluctant to allow recovery without some visible and apparent infliction of physical injury by the defendant because of the following four considerations: (1) lack of precedent; (2) speculative nature of damages; (3) lack of proximate cause; (4) public policy and administrative problems arising out of fraudulent litigation.[14]

Yet, these objections to recovery have been met and surmounted many times by courts and legal writers.[15] The argument that a court has no precedent to follow is hardly a "make-weight" argument today since it is now a minority of jurisdictions which deny recovery.[16]

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[12] 52 Am. Jur. 399, Torts, § 55. As late as 1949 it was said of the New York law on the subject (psychic injury) that it was a "complex admixture of the conservatism of the older English case law and the liberalism of present day psychiatry, all intertwined with a considerable dash of native aberrational variation." McNiece, *Psychic Injury and Tort Liability in New York*, 24 St. Johns L. Rev. 1, 3 (1949).

[13] For recitals of cases on both sides see: Bohlen and Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance*, 32 Col. L. Rev. 409, fn. 2 (1932); McNiece, *supra*, n. 12, pp. 14 and 16, fns. 40 and 43; 52 Am. Jur. 427, fns. 8, 9, Torts § 79; 25 C.J.S. 556, Damages, § 70a. The American Law Institute has, subject to a *caveat* regarding reliability of the evidence, disapproved the necessity of impact for recovery, 2 RESTATEMENT, TORTS (1934) § 436(2).

[14] It has been suggested that the problem has been complicated by the difficulty of both the legal and medical professions to understand the interrelationship between the emotions and physical reactions thereto. See the excellent and exhaustive discussion by Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193 (1944) and Smith and Solomon, *Traumatic Neurosis in Court*, 30 Va. L. Rev. 87 (1943).

[15] Prosser, for example, has said it is "threshing old straw" to deal with them, with the possible exception of the danger of vexatious suits and ficticious claims. PROSSER, TORTS (2d ed. 1955) § 37, 176-177.

[16] See the analytical reasoning of the court in Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930) presenting a very convincing argument against lack of precedent; it has been said that the argument of "no precedent" is no reason at all. If it were, then every case of the first instance would be decided against the party invoking the new

The contention that assessment of damages is entirely too speculative[17] is often expressed as one element of the broad policy argument to be discussed later, and, indeed, it can hardly stand alone. An immediate answer to this contention is that these same courts have always allowed recovery for mental disturbance where mental suffering accompanies physical injury; certainly that added factor does not make easier the task of equating suffering to pecuniary terms.[18]

The third reason for denying plaintiff relief — lack of proximate cause — is one which has bothered the courts considerably. Since breach of duty by defendants toward plaintiff is a necessary element in establishing the tort, it was natural for the courts to seize upon causation and find the physical consequences arising from fright too remote, *i.e.*, defendant had no duty to guard against consequences of the type of which plaintiff is complaining.[19] Modern medical evidence is directly opposed to this notion. The overwhelming view is that emotional distress can cause both mental and physical disorders in the "reasonably prudent man."[20] Whether the injury has followed the shock naturally, and whether such shock is the reasonable,

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rule of law or new application of an established rule. The result would be to put an end to growth of the law through judicial decision. Throckmorton, *Damages for Fright*, 34 Harv. L. Rev. 260, 274 (1921).

[17] To this effect see Cleveland, C.C. & St. L. Ry. Co. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900) and Perry v. Capital Traction Co., 32 F. 2d 938 (D.C. Cir. 1929).

[18] *Supra*, n. 11. A recent English case, Schneider v. Eisovitch, 1 ALL E.R. 169 (1960), presented two difficult questions, one of which concerned damages. While driving with defendant on a holiday in France, plaintiff was rendered unconscious and her husband killed due to the defendant's negligence in smashing the car into a tree. When plaintiff regained consciousness in the hospital and was told of her husband's death, the shock of that information caused serious physical consequences; her other injuries were mild in comparison. The court allowed recovery stating:

> "The fact that the defendant by her negligence caused the death of the plaintiff's husband does not give the plaintiff a cause of action for the shock caused to her, but the plaintiff having a cause of action for the negligence of the defendant may add the consequences of shock caused by hearing of her husband's death when estimating the amount recoverable on her cause of action." (175)

The case is noted in 23 Mod. L. Rev. 317 (1960) and 76 L.Q. Rev. 187 (1960). For an interesting discussion of a mathematical formula for calculating damages for pain and suffering see Note, 1960 Wash. U.L.Q. 302.

[19] Typical of this line of decisions are: Ward v. West Jersey & S.R. Co., 65 N.J.L. 383, 47 A. 561 (1900); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896); Miller v. Baltimore & O. S.W. R. Co., 78 Ohio St. 309, 85 N.E. 499 (1908); Chittick v. Philadelphia Rapid Transit Co., 224 Pa. 13, 73 A. 4 (1909). Often the courts reasoned that mental disorders and the consequences could not be considered proximate results because they were lacking in tangibility and dependent upon the individual pecularities of the injured party.

[20] Smith, *supra*, n. 14, 217.

natural result of defendant's negligence would seem to be questions of fact for the jury. Courts have been criticized for failing to distinguish between fright which is merely the necessary link in the chain of causation[21] and fright alleged as the injury itself.[22]

Broadly speaking, public policy, and more narrowly, difficulties of judicial administration, including fear of both fraudulent and voluminous litigation are perhaps the only realistic objections to denying relief where there has been no impact. This was aptly expressly by Holmes: "[I]t is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone."[23] The impact seems to be regarded as the guaranty of trustworthiness for the claim. Yet, what constitutes impact is not at all clearly or consistently stated by the decisions,[24] and the injury thereby sustained may be feigned as easily as where there is no impact, according to the court in the *Battalla* case.[25]

Criticis of the public policy objection have been annoyed by the often advanced argument for refusing to grant redress on grounds that to do so might increase litigation. They argue that courts are created to dispense justice.[26] Many courts allowing recovery in no-impact cases argue that it is harsh to deny recovery in *all* cases

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[21] *Cf.* Dulieu v. White & Sons, 2 K.B. 669 (1901).

[22] Bohlen, *The Right to Recover for Injury Resulting from Negligence Without Impact*, 50 U. Pa. L. Rev. 141, 152-153 (1902). "The doctrine of Mitchell v. Railway that since fear negligently caused is not actionable, consequences of such fear are not compensable, is a complete *non sequiter* devoid of legal vitality"; Smith, *supra*, n. 14, 211.

[23] Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N.E. 737 (1902) (refusing recovery). The leading case in Massachusetts is Spade v. Lynn & B.R. Co., 168 Mass. 285, 47 N.E. 88 (1897), where the court recognized the public policy argument as the ground for denying recovery. The court said: "It would seem, therefore, that the real reason for refusing damages sustained for mere fright must be something different [than lack of proximate cause], and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule." (89)

[24] It is most interesting that among the decisions from the courts requiring impact, such forces as inhalation of smoke [*Cf.* Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930)], dust in the eye [Porter v. Delaware L. & W.R. Co., 73 N.J.L. 405, 63 A. 860 (1906)] and the slightest of blows — slight electrical shock — [Hess v. Philadelphia Transp. Co., 358 Pa. 144, 56 A. 2d 89 (1948)] have all been regarded as sufficient to substantiate "impact." One of the best examples of the length to which courts will go to find impact in a meritorious case is one cited in the Battalla case, Jones v. Brooklyn Heights R. Co., 23 App. Div. 141, 48 N.Y.S. 914 (1897), wherein plaintiff was hit on the head by a small light bulb which fell from an overhead lamp in defendant's car in which plaintiff was a passenger. Recovery was allowed for a miscarriage brought by the *shock* resulting from the injury.

[25] 10 N.Y. 2d 237, 176 N.E. 2d 729 (1961).

[26] Smith, *supra*, n. 14, 197.

merely because an occasional non-meritorious claim might succeed.[27]

One answer to this contention of the minority is that the flood of litigation not only has not materialized in those jurisdictions which hold that neither impact nor "injury from without" is necessary to make harm from psychic stimuli actionable,[28] but, on the contrary, the reported cases reveal that the volume of litigation has been heaviest in those states *denying* recovery.[29]

Thus, even the public policy objection has been extensively and persuasively challenged, and courts, as in the *Battalla* case, are gradually abandoning it in favor of what is now a clearly majority view allowing recovery where plaintiff would have an otherwise valid cause of action except for the element of impact. Maryland, in relation to other jurisdictions, was among the early adherents to the modern view. The leading case is *Green v. Shoemaker*[30] where plaintiff sued to recover damages for injuries to both her property and person caused by the negligent blasting of rocks by the defendants in the vicinity of her house. In holding that plaintiff could recover for the subsequent physical injury resulting from fright and nervousness stimulated by defendants' wrongful acts, the Court of Appeals discussed the objections of causal connection and expediency, and, while careful to limit its holding as to proximate cause to this case, nevertheless clearly recognized that fright can be a natural consequence of defendants' negligence.[31] On the question of expediency, the

[27] Note the pointed comment of the Maryland Court of Appeals: "[T]he argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all cases* because in *some* a fictitious injury may be urged as a real one." Green v. Shoemaker, 111 Md. 69, 81, 73 A. 688 (1909) (quoted by the court in the principal case). See in particular the language in Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540, 543 (1930), a case of first impression in that jurisdiction, where recovery was allowed.

[28] Smith, *supra*, n. 14, 211, fn. 47.

[29] McNiece, *supra*, n. 12, 31. A reason for this may be the extensive exceptions constructed by these courts where they feel justice demands that recovery be had in spite of the lack of impact. On the other hand it must be recognized that the inducement for settlements which this situation presents may be a reason for the failure of litigation to reach the appellate level in those jurisdictions allowing recovery. The New York lawmakers in 1936 attempted to overrule the Mitchell case by legislation which failed to be enacted. Much information on the entire problem, however, was made available by the *Studies Relating to Liability for Injuries Resulting from Fright or Shock*, 1936 Report of N.Y. Law Revision Committee, Legal Doc. No. 65(E). Information regarding increased litigation is found in this report.

[30] 111 Md. 69, 73 A. 688 (1909).

[31] *Id.*, 79-80.

Court unmistakably asserted that plaintiff will not be denied a remedy on the broad basis of public policy.[32]

Subsequently, the Court of Appeals, in *Tea Company v. Roch*[33] reaffirmed that damages could be recovered for physical injury caused by fright or shock. In that case the manager of a store sent to a nervous woman customer a package containing a dead rat instead of the item ordered.

In both the *Green* and *Roch* cases defendant's negligence was directed toward the plaintiff. *Bowman v. Williams*[34] presented a slight factual variation. There, plaintiff was standing at a window in his house when he saw the defendant's negligently operated truck crash into the basement below him. He suffered a nervous shock resulting in illness because of his fright and his alarm for the safety of his children who were in the basement. Recovery was allowed, the Court reasoning that there was no basis to differentiate the fear caused plaintiff for himself and for his children "because there is no possibility of division of an emotion which was instantly evoked by the common and simultaneous danger of the three."[35]

In the 1950 Term the Court of Appeals twice had opportunity to reaffirm the principle of recovery for consequential damages occurring from fright without impact. The first case was *Mahnke v. Moore*,[36] which allowed recovery to a five year old illegitimate child against the executrix of her deceased father who had maintained a wife and child in New Jersey and a home in Salisbury, Maryland, for his paramour and the plaintiff. Decedent killed the girl's mother with a shotgun, keeping the body in the house with himself and the child for six days. Subsequently, he committed suicide in the plaintiff's presence, drenching her with his blood.[37] While decedent's wanton and willful conduct distinguishes the case from those under general discussion, nevertheless, the Court took the opportunity to recognize recovery for harm arising from fright.

A case decided three months to the day after the *Mahnke* case, *State v. Baltimore Transit Co.*,[38] arose when plaintiff's intestate was standing inside the lobby of a store in which he was supervising installation of plate glass windows. A truck, standing near the curb loaded with

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[32] *Supra*, n. 27.
[33] 160 Md. 189, 153 A. 22 (1931).
[34] 164 Md. 397, 165 A. 182 (1933).
[35] *Id.*, 403; *Cf.* Resavage v. Davies, 199 Md. 479, 86 A. 2d 879 (1952).
[36] 197 Md. 61, 77 A. 2d 923 (1951).
[37] The main point in the case — whether a child could recover in an action of tort against her parent — was noted in 12 Md. L. Rev. 202 (1951).
[38] 197 Md. 528, 80 A. 2d 13 (1951).

plate glass was struck on the street side by a passing streetcar. The declaration averred that intestate died from a heart attack induced by shock from seeing and hearing the crash and from concern for the possible financial loss (rather than fear of physical impact) he might have sustained as a substantial owner of the glass company. Applying the test stated in *Green,* the Court denied plaintiff's claim and held that under the circumstances the shock to decedent ought not to have been contemplated by defendant as a natural and probable consequence.[39]

These cases have followed the guiding principle expressed in the concluding portion of the *Green* opinion:

> "It will be for the Court in future cases of this character, as in all other cases where the questions of proximate cause and legally sufficient evidence arise, to permit no recovery except [where plaintiff would have an otherwise valid cause of action but for the lack of impact] *while denying none upon the ground of mere expediency,* where these principles logically require the submission of the case to the jury."[40]

This "rallying note" of the Maryland Court of Appeals has met with approval from several authorities.[41] It is said that if proper emphasis is placed on instructing juries, *i.e.,* if the court is careful to stress the fact that negligence is not proved unless it appears from a preponderance of the credible evidence that defendant's conduct has created an unreasonable and foreseeable risk of causing injurious psychic reactions in one who is possessed with average health and resistance to injury by such stimuli, there will be few successfully prosecuted spurious claims.[42]

With the *Battalla* decision, New York joins the majority of American jurisdictions in allowing recovery for physical injuries caused by fright resulting from defendant's negligence even though there was no concurrent physical impact. It is submitted that this is the correct view, and as previously noted, has been the law in Maryland for a number of years. As medical knowledge of the

[39] *Id.,* 537. The primary consideration of the Court in sustaining the demurrer was that the declaration stated that decedent substantially feared for injury not to himself, but for the loss of personal property. The Court refused to extend this far the general doctrine of recovery for consequences of fright. *Cf.* Resavage v. Davies, 199 Md. 479, 86 A. 2d 879 (1952).

[40] Green v. Shoemaker, 111 Md. 69, 83, 73 A. 688 (1909). Emphasis added.

[41] Smith, *supra,* n. 14, 302-306; Bohlen and Polikoff, *supra,* n. 13, 417-418.

[42] *Ibid.*

emotional makeup of man continues to increase, and society becomes more and more sophisticated, the minority view may well disappear altogether. Such is the path of the law toward justice — particularly tort law. Man's increased knowledge of his own complexity and the ever changing socio-economic pattern are indications that the law will continue to grant recovery today where it would not yesterday, tomorrow where it will not today.

If such be the case, inquiry might be made as to whether Maryland, one of the fore-sighted jurisdictions in allowing recovery without *impact,* will open the last door in this area of negligence and grant recovery when the act complained of causes mental anguish alone without *any demontrable physical injuries.* The precise point appears not to have been raised. Therefore, we turn to the cases previously mentioned for guidance. There is forceful dictum in both the *Green* and *Sloan* cases recognizing the general rule denying recovery.[43] In *Bowman v. Williams* the Court, through Judge Parke, cites BOHLEN to this effect,[44] and goes on to say: "if a party suffers an *injury,* as *loss of health, of mind, or of life,* through fear of safety for self, a recovery may be had for the negligent act of another. . . . "[45] The injury is defined as: "some *clearly apparent* and *substantial physical injury,* as manifested by an *external* condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state."[46] The Court of Appeals as late as the *Mahnke* case in 1951 quoted this language, and the following year in *Resavage* the Court stated it was not disposed to extend the doctrine of the *Bowman* case.[47] Furthermore, we have seen that recovery was denied in *State v. Baltimore Transit Co.,*[48] where property damage primarily caused the fear.

In view of the definition of "physical injury" adopted by the Maryland Court in this line of cases, it might be argued that the Court is not ready to depart from the generally accepted view denying recovery for mental anguish alone. On the other hand, these cases present a curious blending of strict language with liberal results where the alleged injury was the natural and probable

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[43] *Supra,* ns. 8, 11.

[44] " 'No recovery is allowed for mere fright because fright is not of itself such an injury as must be shown to maintain an action for negligence. . . .' " 164 Md. 397, 400-401, 165 A. 182 (1933).

[45] *Id.,* 401. Emphasis added.

[46] *Supra,* n. 44, 404. Emphasis added.

[47] Resavage v. Davies, 199 Md. 479, 487, 86 A. 2d 879 (1952).

[48] 197 Md. 528, 80 A. 2d 13 (1951). See also *supra,* n. 39.

result of defendant's negligence. Therefore, one may argue that the door is not firmly closed in Maryland to recovery for mental anguish alone, where such disturbance is prolonged and amounts to a substantial injury in a medical sense.

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