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The New York Rule as to Nervous Shock

LYMAN P. WILSON†

A number of American courts (New York among them) still adhere to the rule which denies damages flowing from fright or other nervous shock, unless such mental state is caused or accompanied by some actual contact with the person.¹ This rule is not one of those historical remnants which in so many corners of the law find justification in an ancient if not revered ancestry. Its beginnings are modern and have no connection with the obscure past. To a Roman lawyer, the rule would appear to be a peculiar subversion of justice. "It may * * * be noted as a curious fact that damages for mental suffering, which our courts find so difficult, and frequently impossible to estimate, were the rule in the tort of *iniuria* at Roman Law. The attitude of not a few American courts, which have deliberately denied redress in these cases because of an assumed difficulty in determining the money value of mental distress, would have been incomprehensible to a Roman magistrate. American practice, is, of course, determined by the fact that the theory of damages is compensatory, while juries are inclined to estimate them upon a penal basis. We might look with a little envy upon a system, which in this respect derived its theory from its practice."² This refusal to allow damages for injuries flowing to a plaintiff through nervous shock alone is a distinct anomaly. Courts freely admit the power of mental states to produce actual physical disorder and illness. The language of Allen, J., in *Spade v. Lynn & Boston R. R.*,³ is typical:

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¹See earlier annotations in this journal: 5, 489; 11, 262. It is not intended here to cite other authorities at length. The following are a few of the articles bearing upon the propriety of an award of damages for mental suffering: Ainslie, *Damages for Physical Injuries from Nervous Shock*, 8 Va. L. Reg. 236, 311; Alberts-worth, *New Interests in the Law of Torts*, 10 Calif. L. Rev. 466, 487; Bohlen, *The Right to Recover for Injury Without Impact*, 41 Am. L. Reg. 141; Burdick, *Tort Liability for Mental Disturbance and Nervous Shock*, 5 Col. L. Rev. 179; Clifton, *Action for Mental Suffering Unaccompanied by Physical Injury*, 57 Cent. L. J. 44; Collier, *Shock as Actionable in Negligence*, 79 Cent. L. J. 204; Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497; Lotz, *Mental Suffering*, 55 Cent. L. J. 202; Moses, *Are Bodily Injuries Resulting from Nervous Shock Actionable?* 20 Nat. Corp. Rep. 81, 117; Parry, *Nervous Shock as a Cause of Action in Tort*, 41 L. Q. Rev. 297; Smith, *Torts Without Particular Names*, 69 U. Pa. L. Rev. 91; Tibbetts, *Neurasthenia, the Result of Nervous Shock*, 59 Cent. L. J. 83; Throckmorton, *Damages for Fright*, 34 Har. L. Rev. 260.

²Radin, *Fundamental Concepts of the Roman Law*, 12 Calif. L. Rev. 481, 486.

³168 Mass. 285, 290, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393 (1897). Annotated: 11 Har. L. Rev. 202.

"The exemption from liability for mere fright, terror, alarm, or anxiety does not rest upon the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life * * *. It must be admitted that a timid, or sensitive person may suffer not only in mind, but also in body from such a cause. Great emotion may and sometimes does produce physical effects." The significance of an admission that it is possible, with the aid of medical science, to trace the injurious effects of the defendant's act through an intervening mental state to an actual physical disorder is too clear to require extended comment. Perhaps it is not too much to assert that such results are matters of common knowledge. If then, in a given case, it is possible thus to trace the plaintiff's disordered condition back to the act or omission of the defendant, as one of the reasonably-to-be-anticipated results thereof, we have all of the elements which are usually thought sufficient to spell out a wrong. Therefore, when a court denies a recovery in such a case it must face the duty of explaining its apparent departure from the principles usually invoked.

To their credit let it be said that the courts have been entirely frank in stating their reasons for departing from the customary rule. Uniformly, these statements show a basic distrust of the legal machinery as a measuring device. Ordinarily it is not indicated whether the distrust arises from the supposed credulity of the jury, or from the similar liability that the jury will be unduly swayed by their own emotions, or possibly from the feeling that in such a case no reliance may safely be placed upon the word of interested litigants, who know that it will be impossible to impose any effective check upon their testimony. But there usually is the unequivocal assertion that there is no guarantee of the actuality of causation in such a case, and that therefore the customary tests for fixing responsibility must be disregarded. In other words, legal theory must yield to practical experience. The rule therefore is purely pragmatic, and finds justification only to the extent that it is necessary to invoke such an exception to keep the machinery of the law from working harm. The statement of the Court of Appeals of New York in the *Mitchell* case⁴ rather clearly chooses the last of these positions. "If the right to recovery in this class of cases should once be established, it would naturally result in a flood of litigation in cases where the injury may be easily feigned without detection, and where the damages must

⁴*Mitchell v. Rochester, etc., R. R. Co.*, 151 N. Y. 107, 110, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604 (1896).

rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they are caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. * * * These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by another, where there is no immediate personal injury."

Much the same idea is expressed in slightly different language in the *Spade* case:⁵ "It would seem therefore that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests upon the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science having to do with the affairs of life, any rule is unwise, if in its general application it will not as a usual result serve the purposes of justice. * * * We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of the rule is that it is unreasonable to hold persons, who are merely negligent, bound to anticipate fright and to guard against the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met." Disregarding the probable error of the court in the matter of specific foreseeability of fright, complaint, if any, must be directed to the court's distrust of its own discernment and judgment. It is extremely difficult to believe that courts and juries are credulous to the degree which this excerpt pictures, yet one of our most revered jurists, Justice Holmes himself, subscribes to this principle in the following language: "As has been explained repeatedly, it is an arbitrary exception, based upon the notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone."⁶ * * * But when there has been a battery and the nervous shock results from the same

⁵*Supra*, n. 3.

⁶Here citing the *Spade* case, *supra*, n. 3, and *Smith v. Postal Telegraph-Cable Co.*, 174 Mass. 576, 55 N. E. 380, 47 L. R. A. 323, 75 Am. St. Rep. 374 (1899).

wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person, there is no reason to press further the exception to general rules."⁷

Parenthetically, it should be remarked that this problem is not to be confined to the field of tort, for it must necessarily intrude in all those cases of breach of contract in which the chief item of damage is that for emotional disturbance. For example, take any of the "food cases." If a patron of a restaurant is furnished food, which, being unfit for human consumption, makes him ill before he has consumed any of it, the problem is at once raised whether, in an action going upon the theory of warranty of quality, the mental upset of the patron shall be considered as aggravating the damages, or whether the patron shall be limited to the much narrower field of difference of value between promise and performance. The problem of reality of causation is here the same, though in making the award in such cases the courts have almost never specifically recognized this fact.

Without going further into the details underlying the situation,⁸ it seems both safe and fair to accept the rule at the face value placed upon it by those courts by which it has been approved. It is a rule supposedly founded upon experience, offering an exception to a principle normally announced, and justified as an exception upon the ground that it produces more accurate results in practice. Since the

⁷*Homans v. Boston El. Ry.*, 180 Mass. 456, 457, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324 (1902). Lord Wensleydale makes a very similar statement in *Lynch v. Knight*, 9 H. L. Cas. 577, 598 (1861). "Mental pain or anxiety the law cannot value and does not pretend to redress, when the unlawful act causes that alone; though where a material damage occurs, and is connected with it, it is impossible that a jury in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, unless the daughter is also a servant, the loss of whose service is a material damage which the jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honour and wounded feelings of the parent."

⁸Recently annotated cases include the following: *Hanford v. Omaha & Council Bluffs St. Ry.*, 203 N. W. (Neb.) 643 (1925); annotated: 24 Mich. L. Rev. 311. *Kenny v. Wong Len*, 128 Atl. (N. H.) 343 (1925); annotated: 11 CORNELL LAW QUARTERLY 262. *Lambert v. Brewster*, 97 W. Va. 124, 125 S.E. 244 (1924); annotated: 25 Col. L. Rev. 502, 38 Har. L. Rev. 687, 11 Va. L. Reg. n. s. 235. *Hambrook v. Stokes Bros.* (1925), 1 K. B. 141 (1924), W. N. 296, 41 T. L. R. 125, 132 L. T. 707, 94 L. J. (K. B.) 435, annotated: 41 L. Q. R. 297, 2 Camb. L. J. 247, 160 L. T. 185, 58 Ir. L. T. 309, 73 U. Pa. L. Rev. 280, 34 Yale L. J. 554, 25 Col. L. Rev. 107, 28 Law Notes 211.

For an extended review of authorities see, *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 740. (1907).

justification by results is claimed for it, no fairer test could be asked than the consideration of the manner in which the rule operates when applied. In this connection certain recent cases offer both entertainment and food for thought.

In 1916⁹ a guest at a hotel objected to the presence of a mouse in a kidney *saute* with which he had been served. He had eaten a portion of the dish, had transferred more from the casserole to his plate, and was then horrified, according to his statement, to discover upon his plate half of the body of a dead mouse, while the other half reposed in the casserole. He claimed to have been made violently ill. While this case seemingly goes on the theory of warranty of fitness for food, the only external guarantee of the reality of his illness, such as is demanded in the cases above cited, lies in the fact that he had eaten some of the food which had been in contact with the mouse, and had actually lifted part of the mouse with his spoon. While the reported decision fails to state specifically whether the illness was the result of the harmful nature of the food, the manner in which the facts are set forth leave the impression that the physical condition of the plaintiff was caused solely by the sight of the mouse. The fact that the court remains silent upon the rule of the *Mitchell* case, and lays no stress upon the theory of the action leaves room for questioning whether the court is not adroitly dodging the application of the *Mitchell* case. In a later decision in the Appellate Division¹⁰ the court of the Second Department seems to consider these omissions to be of significant weight.

In the quite recent case of *Sider v. Reid Ice Cream Company*¹⁰ the plaintiff was nauseated and made ill by the sight of a dead cockroach imbedded in a charlotte russe, which she was then engaged in eating. She had not touched nor eaten any portion of the insect. The defendant relied upon the *Mitchell* case, and the court wisely ignored the opportunity to make use of an obvious sophistry to the effect that the requirements of that rule were technically satisfied by reason of the fact that the patron had touched a portion of the food which in turn had touched the dead insect. Instead, the court stood squarely upon the ground that there is no reason for distinguishing between the cases in which the mental distress was caused by wilful act, where recovery is allowed without any question, and those in which the distress was caused by some negligent omission. The court said:

⁹*Barrington v. Hotel Astor*, 184 App. Div. (N. Y.) 317, 171 N.Y.S. 840 (1918), annotated: 13 Bench & Bar n. s. 198, 32 Har. L. Rev. 71, 17 Mich. L. Rev. 261, 4 Va. Leg. Reg. n. s. 793, 46 Wash. L. Rep. 675, 47 id. 134, 28 Yale L. J. 294.

¹⁰*Sider v. Reid*, 125 Misc. (N. Y.) 835, 836, 211 N.Y.S. 562 (1925), annotated: 26 Col. L. Rev. 365.

"There seems to be no reason for the rule announced in the *Mitchell* case. It is said that the rule was adopted as one of public policy, or as one of necessity to avoid the perpetration of fraud. Whatever may have been the prevailing conditions when this rule was announced, there is now no need of it upon the score of public policy or necessity. The rule has not been applied in a case like the one under consideration, where a foreign substance was contained in a food that was served by defendant. [Citing the *Barrington* case.⁹] * * * We think this whole subject should receive the further consideration of the appellate courts."

In the very recent case of *Carroll v. New York Pie Baking Company*¹¹ the plaintiff complains that she was made ill when she discovered several large cockroaches imbedded in the lower crust of the piece of pie which she was then eating. "They were crushed to such an extent that they are said to have resembled butterflies." Jaycox, J., attempts to distinguish the *Mitchell* case as follows: "In the *Mitchell* case the plaintiff sought to recover for fright and the injuries resulting therefrom. In this case the recovery is not based upon fright. The plaintiff claims a physical injury."¹² The inference thus presented is hardly a fair one. There was physical injury in the *Mitchell* case, an injury far more serious than the mere unburdening of an insurgent stomach. "She [the plaintiff, *Mitchell*] testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result."¹³

It is said in the *Carroll* case¹⁴ that since a recovery was clearly allowable if a portion of the foreign substance were eaten and were followed by illness, it was proper to go a step further. "If the article of food, when cut, had emitted an offensive odor, which nauseated the plaintiff, her right to recover in this action would have been clear." Why? Is the court inviting the use of a sophistry to the effect that an odor, after all, is composed of very minute particles of the object carried into contact with the nasal membranes, and that therefore there is sufficient "touching" to satisfy the rule? The court also states that odors constitute "nuisances," and that, though nuisances arising from disagreeable sights are less common than other kinds,

¹¹215 App. Div. (N. Y.) 240, 213 N.Y.S. 553 (Jan. 22, 1926).

¹²213 N. Y. S. 553 (1926).

¹³*Supra*, n. 4, at p. 108.

¹⁴213 N. Y. S. 553, 554 (1926).

they do exist. But to *call* a thing a "nuisance" does not give reasons for imposing liability. The use of this term rather begs the question. The court later attempts to distinguish the *Mitchell* case in the following language: "The plaintiff in this [*Carroll*] case makes no claim that she was frightened. There is nothing about a cockroach, or several cockroaches, that would cause fright, especially when dead and crushed to such an extent that they resemble butterflies." This is substituting the less for the greater with a vengeance. Is there any one of us who would not prefer nausea, with any attendant consequences, to a downright case of fright?

Whatever may be the feeling about the reasoning by which it is reached, the *result* in the *Carroll* case seems eminently proper. A return to basic principles, if possible, is greatly to be desired. The only justification of the *Mitchell* case has been the claim of practical expediency, i. e., ease of application and exclusion of spurious claims. As to the first, no court has a normal right to purchase ease of administration at the expense of justice, and it is doubtful whether a court will ever, except in an extreme case, do so. The question then revolves around the second point, the danger of false claims. This, of course, is a question of fact. In its determination the state of development of medical science must be considered, and whenever it becomes possible with fair accuracy to distinguish the feigned mental state from the real, the sole ground of support for the *Mitchell* case will have been removed. To many courts it has seemed that such a point was reached long ago, and certainly this feeling is strong in the minds of those New York courts which have recently been called upon to apply the rule. If their struggles are any evidence, the rule is not easy to apply. If they feel compelled to go to present lengths to avoid arbitrarily fixed results, we may be justified in questioning whether in practice, the rule is producing approximate justice. Whenever a mechanically applied rule becomes unjust a crop of absurd exceptions is to be expected. These are now being proposed for the rule of the *Mitchell* case in such numbers as to force the conclusion that the "whole subject should receive further consideration from the appellate courts." The rule of the *Mitchell* case was neither just nor logical, and it is open to serious question whether experience has proved it practically expedient.