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imate cause all too current in decisions of that period. He foresaw that legal duty was a necessary antecedent to liability for negligence. The more searching analysis of the last forty years into this branch of "Everyman's Law" however, if this study is correct, indicates that such a case should be squarely decided upon the question of legal duty alone. It is hoped that the Montana Court will have opportunity to re-examine the question when the facts warrant in the light of a general recent tendency to consider many cases formerly decided in the law of proximate cause as presenting more properly an inquiry into the subject of legal duty.

—John D. McKinnon.

RECOVERY FOR NERVOUS INJURY CAUSED BY NEGLIGENCE WITHOUT IMPACT

On three occasions the attention of the Montana Supreme Court has been directed to the question of tort liability for mental or nervous injury caused by negligence where there has been no contemporaneous physical impact upon the person of the plaintiff. In 1909, the court, in sustaining a special demurrer for uncertainty to a complaint, indicated that "The right was with the defendants of having the plaintiff allege specifically whether she claimed damages as the result of physical injuries and mental disturbance, or the latter alone, so that they might prepare for trial.'"[1] Again in 1934 in *Cashin v. Northern Pacific Ry Co.*[2] the question was before the court; the court held that plaintiff may recover for physical injury caused by the defendant's negligent conduct even though there was no contemporaneous physical contact. The latest Montana pro-

[1]Hosty v. Moulton Water Co. 39 Mont. 310, 102 P. 568.

[2]96 Mont. 92, 28 P. (2d) 862. Plaintiff lived near the railroad tracks of defendant in a mountainous area where rocks threatening the safety of the railroad grade were from time to time removed by blasting. Without notice to the plaintiff, whom defendant knew to be a woman of nervous temperament, defendant set off a charge of dynamite shattering glass in the Cashin home and prostrating the plaintiff, causing physical injury induced by the shock. In giving judgment for the plaintiff, the Court said, "Often the physical injury caused by the wrecking of the nervous system is more serious and lasting than the breaking of bones or the tearing of flesh, and, where it is clearly shown that such injury was suffered and was proximately caused by the negligent act of the defendant, a cause of action exists for damages for the resulting injury, and stands on a more firm foundation of reason than does that class of cases wherein it is held that the plaintiff must have been physically battered, 'although slightly', in order to recover for fright or mental distress."

nouncement came in the case of *Kelly v. Lowney & Williams*,[3] affirming the position taken in the Cashin case.

In the latter case, auto salesman Lowney, an officer of the firm of Lowney & Williams, defendants, called upon Jensen with whom he was about to close a sale for an auto. Jensen accompanied Lowney to the car, and got into the driver's seat "to see what it feels like." Lowney knew Jensen could not operate an automobile and that the vehicle was being purchased for Jensen's daughter to drive. The motor was started under Lowney's direction and allowed to run several seconds, when suddenly the car shot forward. It pursued a devious path for a few blocks guided by the inexpert handling of Jensen and finally crashed into the house occupied by Nellie Kelly. Mrs. Kelly's daughter cried out that it must be an earthquake and Mrs. Kelly thought it was an explosion. There was no contemporaneous physical contact between the machine and Mrs. Kelly. Six months later she was dead, the doctor said from complications arising out of a cold. The children testified that after the accident their mother could not sleep, was nervous, and worried about who was to pay for the damage to the house. The husband, as administrator, sued for injuries to Mrs. Kelly and to the house. He recovered a judgment for $3500, $1000 of which covered the damage to the dwelling. On appeal, the Court affirmed the judgment as to the cause of action involving property damage, but reversed and remanded the cause dealing with the personal injuries to Mrs. Kelly on the basis of an erroneous instruction which assumed as a matter of law that the crash was the proximate cause of the death. The Court remarked in the portion of the opinion with which this comment deals, "At the outset it is well to point out that in this state there may be recovery for damages for personal injuries occasioned by fright or mental shock though there be no physical contact."[4]

There has been a sharp split among the authorities as to whether the defendant must respond in damages for physical injuries as a consequence of fright induced by defendant's conduct where there is no contemporaneous physical injury. It seems that no recovery is permitted in the federal courts, in Arkansas, Georgia, Illinois, Kentucky, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, and Pennsyl-

[3](1942) ...... Mont. ......, 126 P. (2d) 486.
[4](1942) ...... Mont. ......, 126 P. (2d) 486, 487.

vania.[5] Canada likewise denies recovery.[6] The reasons advanced for denying recovery in this class of cases are first, since fright itself is not a cause of action, its consequences are not compensable; second, the damages resulting from the fright are too remote; and third, that it is contrary to public policy to allow recovery for personal injuries resulting from fright.[7]

Professor Bohlen[8] answers in this manner the argument that the consequences of fright warrant no recovery since fright itself is not a cause of action: "The fright is not the ground of the action—the physical injury is the damage alleged; the fright is but stated as indicating the causal connection between the wrong and the injury. . . . " The difference is succinctly stated in 25 C. J. S. 552 as follows: "Mental pain and suffering as such must be distinguished from pain and suffering ensuing from an injury to the nervous system, which is to be regarded as a physical injury, and as such sufficient in itself to support a recovery of damages." When it is perceived that the action is prosecuted for the physical results of the fright, and not for any fleeting and immeasurable inequilibrium in the mind alone, there is less objection to permitting recovery.

Text authority[9] on the proximate cause aspect of the question denominates the fright of the plaintiff occasioned by defendant's wrongful conduct as an intervening but not supersed-

[5]Haile v. Texas & P. R. Co. (1894) 60 F. 557, 23 U. S. App. 80, 9 C. C. A. 134, 23 L. R. A. 774; St. Louis I. M. & S. R. Co. v. Bragg (1901) 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206; Allen v. Harris & Satterfield (1916) 146 Ga. 232, 91 S. E. 28; Braun v. Craven (1898) 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, 5 Am. Neg. Rep. 15; Louisville & N. R. Co. v. Roberts (1925) 207 Ky. 310, 269 S. W. 333; Spade v. Lynn & B. R. Co. (1897) 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; Nelson v. Crawford (1899) 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577; Weissman v. Wells (1924) 306 Mo. 82, 267 S. W. 400; Ward v. West Jersey & S. R. Co. (1900) 65 N. J. L. 383, 47 A. 561; Mitchell v. Rochester Ry. Co. (1896) 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; Miller v. Baltimore & O. S. W. R. Co. (1908) 79 Ohio St. 309, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699; Ewing v. Pittsburg C. C. & St. L. R. Co. (1892) 147 Pa. 140, 23 A. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709.

[6]Henderson v. Canada Atlantic R. Co. (1898) 25 Ont. App. Rep. 437.

[7]Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 265 (1921).

[8]*Right to Recover for Injury Resulting from Negligence Without Impact*, 50 AM. L. REG. 141, 173 (1902).

[9]25 C. J. S. 557. "A more logical view is that, in the case of physical consequences of fright, the fright occasioned by defendant's wrongful act is an intervening but not a controlling cause, and that a recovery may be had for the physical consequences as the natural and proximate consequences of the original wrongful act."

ing cause. In *Purcell v. St. Paul City Ry. Co.,*[10] a woman suffered fright and ultimate miscarriage as a result of confusion and alarm attending a near collision between another car and the car of defendant on which the plaintiff was a passenger; the court treated proximate cause in this fashion: "Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries." Writers[11] regard the fright simply as a link in the chain of causation, much as the impact is considered a link. The trend of modern decisions would seem to indicate that if plaintiff is to be denied recovery for nervous injury it must be on grounds other than as a study in the law of proximate cause.

The third reason advanced for denying recovery in this class of cases is the most substantial. The Mitchell case[12] and the Spade case,[13] both early decisions, emphasize the practical hazards of enforcing a rule of recovery where the claims can be easily feigned and are supported by the partisan testimony of the plaintiff and medical experts. The New York court thus registered its objection in the Mitchell case:

> "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest on mere conjecture or speculation."

The reasoning of the courts has been that since no practical rule can be administered in the absence of impact, no recovery at all should be permitted. And the requirement of impact in most industrial states must still be met today in mental disturbance cases.[14] Guaranty of the genuineness of the injury[15] is found in

[10](1892) 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

[11]Throckmorton, 34 HARV. L. REV. 260, 268 (1921); Bohlen, 50 AM. L. REG. 141, 173 (1902).

[12]Mitchell v. Rochester Ry. Co. (1896) 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604. Comstock v. Wilson (1931) 257 N. Y. 231, 177 N. E. 431, 76 A. L. R. 676, seems to limit the Mitchell case.

[13]Spade v. Lynn & B. R. Co. (1897) 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393. A later Massachusetts case, Freedman v. Eastern Mass. St. Ry. Co. (1938) 299 Mass. 246, 12 N. E. (2d) 739 intrudes on the doctrine of the Spade case.

[14]PROSSER ON TORTS, p. 214.

[15]Homans v. Boston Elevated Ry. Co. (1902) 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324. Per Holmes, C. J. "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

the impact, according to this view, but any contact, dust in the eyes,[16] or a rough seating on the floor,[17] is sufficient for the purposes of the doctrine. Professor Goodrich[18] states that thus the magic formula, impact, is pronounced and the door opens to the joy of a complete recovery, although it is frankly admitted that damages are not limited to the hurt caused by the impact alone. Thus is seen the anomaly of the recognition of a cause of action, whereas relief is denied because of public policy, absent the magic formula.

Courts of other jurisdictions are aware of the principal objection to the doctrine, namely, the administrative difficulty, but recognize that it is the policy of the law to permit just litigation. Hence, recovery is allowed in fright cases even though there is no impact in the states of Alabama, California, Louisiana, Maryland, Minnesota, Montana, Nebraska, New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, and Wisconsin.[19] England, Ireland and Scotland also permit recovery.[20] Bohlen urges that the physical injury caused by the fright through the internal operation of the mind and nervous system may be proved like any other injury quite as accurately as many of the intricate consequences of a physical impact.[21] In the words

guaranteed by proof of a substantial battery of the person, there is no occasion to press further the exception to general rules."

[16]Porter v. Delaware L. & W. R. Co. (1906) 73 N. J. L. 405, 63 A. 860.

[17]Driscoll v. Gaffey (1910) 207 Mass. 102, 92 N. E. 1010.

[18]*Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 504 (1922).

[19]Central of Georgia R. Co. v. Kimber (1924) 212 Ala. 102, 101 So. 827; Lindley v. Knowlton (1918) 179 Cal. 298, 176 P. 440; Stewart v. Ark. So. Ry. Co. (1904) 112 La. 764, 36 So. 676; Green v. Shoemaker & Co. (1909) 111 Md. 69, 73 A. 688, 23 L. R. A. (N. S.) 667; Purcell v. St. Paul City Ry. Co. (1892) 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Cashin v. Nor. Pac. Ry. Co. (1934) 96 Mont. 92, 28 P. (2d) 862; Hanford v. Omaha & C. B. St. Ry. Co. (1925) 113 Neb. 423, 203 N. W. 643, 40 A. L. R. 970; Chiuchiolo v. New England Wholesale Tailors (1930) 84 N. H. 329, 150 A. 540; Watkins v. Kaolin Mfg. Co. (1902) 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617, 13 Am. Neg. Rep. 197; Salmi v. Columbia Ry. Co. (1915) 75 Or. 200, 146 P. 819, L. R. A. 1915D 834; Simone v. Rhode Island Co. (1907) 28 R. I. 186, 66 A. 202, 9 L. R. A. (N. S.) 740; Mack v. South Bound R. Co. (1898) 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; Sternhagen v. Kozel (1918) 40 S. D. 396, 167 N. W. 398; Memphis St. R. Co. v. Bernstein (1917) 137 Tenn. 637, 194 S. W. 902; Gulf, C. & S. F. R. Co. v. Hayter (1900) 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856; O'Meara v. Russell (1916) 90 Wash. 557, 156 P. 550, L. R. A. 1916E 743; Lambert v. Brewster (1925) 97 W. Va. 124, 125 S. E. 244; Pankopf v. Hinkley (1909) 141 Wis. 146, 123 N. W. 625, 24 L. R. A. (N. S.) 1159.

[20]Annotation, 11 A. L. R. 1134.

[21]50 AM. L. REG. 141, 172.

of *Bowman v. Williams*,[22] "These considerations (effect of fright being subjective, imaginative, conjectural and speculative) undeniably tend to multiply fictitious or speculative claims, and to open to unscrupulous litigants a wide field for exploitation, but these difficulties are common, are surmountable, and so should not prevent the operation of the general and fundamental theory of the common law that there is a remedy for every substantial wrong." It is submitted that a better view is to recognize the physical injury caused by nervous disturbance as a cause of action in the substantive law of torts and leave the solution of the question of the feigned claims to be dealt with according to the law of evidence.

The Torts Restatement, section 436,[23] is in point. With Subsection (1) we are not here concerned since that states the rule of liability for negligent conduct which is obviously likely to cause the fright but not the bodily harm which did in fact occur. Under Subsection (2) the actor is not protected from liability when his conduct is negligent as creating an unreasonable risk of bodily harm by means of, for example, impact, where the victim manages to escape the peril but suffers physical illness or injury as a result of the fright. The Restatement concurs with the majority of courts in recognizing a legitimate cause of action, but appends a specific caveat expressing no opinion as to whether the unreliability of the testimony necessary to establish the causal connection between the negligence and the illness or injury may make it proper for the court of a particular jurisdiction to refuse to place liability on the defendant as a matter of administrative policy.

[22](1933) 164 Md. 397, 165 A. 182.

[23]§436 Physical Harm Resulting from Emotional Disturbance.

"(1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability."

Caveat to Subsection (2): The Institute expresses no opinion that the unreliability of the testimony necessary to establish the causal relation between the actor's negligence and the other's illness or bodily harm may not make it proper for the court of a particular jurisdiction to refuse, as a matter of administrative policy, to hold the actor liable for harm to another which was brought about in the manner stated in this Subsection.

In the jurisdictions permitting recovery for negligent invasion of plaintiff's right to be free from physical injury without impact, it is generally recognized that plaintiff's case will be stronger when he has been put in peril of imminent bodily harm. Recovery has also been allowed in cases of peril to a third person witnessed by plaintiff when plaintiff has some close family relationship,[24] of wilful or wanton wrong,[25] and of invasion of the right of privacy.[26] A minority of the courts permit recovery against a telegraph company for negligent transmission of messages which indicate on their face that damage may result;[27] but a majority of the states and the federal courts[28] are opposed. In food contamination cases, recovery is often allowed; the nausea is taken by some courts to be the impact.[29] Actions for recovery

[24]Lindley v. Knowlton (1918) 179 Cal. 298, 176 P. 440; Frazee v. Western Dairy Products Co. (1935) 182 Wash. 578, 47 P. (2d) 1037; Hambrook v. Stokes [1925] 1 K. B. 141, 94 L. J. K. B. 435; Lambert v. Brewster (1925) 97 W. Va. 124, 125 S. E. 244. 11 A. L. R. 1143 states the general rule thus: "Recovery for the physical consequences of fright at another's peril has generally been denied." See Prosser at p. 218.

[25]Lesch v. Gt. Northern Ry. Co. (1906) 97 Minn. 503, 106 N. W. 956; Rogers v. Williard (1920) 144 Ark. 587, 223 S. W. 15, 11 A. L. R. 1115; Gadbury v. Bleitz (1925) 133 Wash. 134, 233 P. 299, 44 A. L. R. 425. In the Rogers case said the court: ". . . . . while it is held that there can be no recovery for bodily pain resulting from fright caused by an unintentional negligent act where the fright is not accompanied by bodily injury, still it is inferable from that case (St. L., I. M. & S. R. Co. v. Bragg (1901) 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206) and the cases cited in the decision that the right to recover for bodily pain and suffering resulting from fright which is caused by a willful wrong may be regarded as established in this state."

[26]Hinish v. Meier & Frank Co. (1941) 166 Or. 482, 113 P. (2d) 438. Plaintiff sued defendant which had caused a telegram falsely using plaintiff's name as a signature to be sent to the governor of Oregon urging him to veto a bill which would have prevented defendant from engaging in the optical fitters' business. Plaintiff alleged he was a civil service employee and by law prohibited from engaging in political activities and that the telegram jeopardized his rights. The court in overruling a demurrer to the complaint said, "But it is well settled that where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the direct, proximate and natural result of the wrongful act. . . . . Violation of the right of privacy is a wrong of that character."

[27]PROSSER ON TORTS, p. 216.

[28]Mees v. Western Union Tel. Co. (1932) 55 F. (2d) 691 on the authority of Jones v. Western Union Tel. Co. (1916) 233 F. 301 and Ey v. Western Union Tel. & Cable Co. (1924) 298 F. 357, which were based on Southern Express Co. v. Byers (1915) 240 U. S. 612, 60 L. Ed. 825, 36 S. Ct. 410. The Byers case was one for mental damages for negligent transfer of the body of plaintiff's wife. ". . . . . the decisions to this effect (denying recovery) rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation."

[29]Kenny v. Wong Len (1925) 81 N. H. 427, 128 A. 343. "To discriminate between this (finding a mouse in plaintiff's mouth making her sick

in this type of case are sometimes prosecuted on the theory of implied warranty.[30] In some cases, courts have permitted recovery where defendant's practical joke has resulted in harm to the plaintiff;[31] whether this is based on negligence or wilful tort is not too clear.

The Montana Court has adopted the forward view on the question of liability of a negligent defendant for physical injuries to a plaintiff caused through the medium of emotional disturbance. The impact doctrine is receiving less favorable treatment in the courts even in those states where impact is essential to make the cause of action complete. In such states, damages are not limited to the mere physical injury caused at the place of contact, but include in the recovery any mental or nervous injury brought about by the fright as well, thus revealing only a tenuous basis for differentiating the cases of impact on the person from those in which no impact was present. The nervous system is a part of the body and is susceptible of lesion from causes primarily acting on the mind.[32] It is admitted that there is danger in the possibility of fabricated claims being put forth by unscrupulous litigants. Let the court dispose of this objection in the particular case as a question of the law of evidence, thus permitting recovery in some cases while denying it in others. The common law has a rich tradition of providing a remedy for every substantial wrong, and there is presented in this line of cases an opportune occasion for application of this common law principle.

—James A. Nelson.

and requiring medical attention) and an external force such as a blow, cut, break or wrench would be a legal refinement, wholly arbitrary and unjust." The New Hampshire court broadens the definition of fright in this case also. "Immediate physical injury as the result of negligence being shown, whether or not induced by some sort of fright, there may be recovery for subsequent mental or nervous trouble with its attendant bodily effects, whether or not produced by fright in a narrow sense or in a broad one to include emotions of disgust and shame, if negligence is proved as its cause."

[30]Wheeler v. Balestri (1939) 304 Mass. 257, 23 N. E. (2d) 132. Nominal damages only were awarded and these on the basis of implied warranty statutes since the Massachusetts rule forbids recovery where there is no physical injury as a result of impact or eating of the food.

[31]Wilkinson v. Downton (1897) 2 Q. B. D. 57; Great A & P Co. v. Roch (1930) 160 Md. 189, 153 A. 22. Contra, Nelson v. Crawford (1899) 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577. Green, *Fright Cases*, 27 Ill. L. Rev. 873, 882 (1933), favors placing liability on the practical joker. "What consequences should attach to the acts of a practical joker? It is his fun; it has no economic value; there are no conflicting interests as there are in the other cases. Why should not the practical joker bear the risks of injury which may result from his joke?"

[32]Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 44 P. 320. 32 L. R. A. 193.